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FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-
GENERAL, AND THE OPINIONS OF GENERAL
IMPORTANCE OF THE TERRI-
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER,

*Author of an Index to the United States Supreme Court Reports;
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
and Tennessee, a Digest of the Texas Reports, and
local works on Pleading and Practice.*

VOL. XIV.

DEDICATION — EQUITABLE SUITS.

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EXPLANATORY.

1. The cases in this work are arranged by subjects, instead of chronologically. They are assigned to the various general heads of the law, and each subject is divided and subdivided, for convenience of arrangement and reference, with head-notes, or table of contents, at the head of each subject, the same as an ordinary digest.

2. At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. Where points in a case are carried to another division of a subject, they are put into the foot-notes, or notes following the cases, and reference is made to the case by section numbers in parenthesis at the end of the section.

3. The cases in full are arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*.

4. At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. 2d. Points taken from cases which will appear in full under some other division of the same subject. 3d. Points taken from cases which are assigned to some other general head. 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General.

5. Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, DOE v. ROE.* The tables of cases will also contain a similar designation of rejected cases, so that in consulting them the reader will readily see whether he is referred to a case in full or only a digest.

6. The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.

NOTE.

The subject of DOMESTIC RELATIONS, in this volume, was edited by JAMES SCHOULER, Esq., one of the special editors selected for this work, and the certificate of approval is, therefore, omitted.

From some of the shorter subjects no cases were rejected, and those which were rejected from other subjects were few in number, and their want of value was apparent. No cases were published in full under EMBARGO LAWS, for the reason that they were decided under laws which are obsolete or have been repealed, and contained no general principles of law on other subjects which would render them of any value. The cases rejected from those subjects were not, therefore, submitted to any one for approval.

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ABBREVIATIONS.

Abbott's Admiralty	Abb. Adm.	Lowell	Low.
Abbott's U. S.	Abb.	McAllister	McAl.
Albany Law Journal	Alb. L. J.	McCahon	McCahon.
American Law Register ...	Am. L. Reg.	McCrary	McC.
Baldwin	Bald.	McLean	McL.
Bee	Bee.	MacArthur	MacArth.
Benedict	Ben.	Marshall	Marsh.
Bissell	Biss.	Martin	Martin (N. C.).
Black	Black.	Mason	Mason.
Blatchford	Blatch.	Montana Territory	Mont. T'y.
Blatchford's Prize Cases ...	Bl. Pr. Cas.	Newberry	Newb.
Blatchford & Howland ...	Bl. & How.	National Bankruptcy Regis-	
Bond	Bond.	ter	N. B. R.
Brewster	Brewster.	Olcott	Olc.
Brockenbrough	Marsh.	Opinions of Attorneys-Gen-	
Brown	Brown.	eral	Opp. Att'y Genl.
Call	Call (Va.).	Oregon	Oreg.
Central Law Journal	Cent. L. J.	Otto	Otto.
Chase's Decisions	Chase's Dec.	Overton	Overton (Tenn.).
Chicago Legal News	Ch. Leg. N.	Paine	Paine.
Clifford	Cliff.	Peters	Pet.
Colorado Territory	Colo. T'y.	Peters' Admiralty	Pet. Adm.
Connecticut Reports	Conn.	Peters' Circuit Court	Pet. C. C.
Cooke	Cooke (Tenn.).	Philadelphia Reports	Phil.
Court of Claims	Ct. Cl.	Pittsburgh Reports	Pittsb. R.
Crabbe	Crabbe.	Sawyer	Saw.
Cranch	Cr.	Smith	Smith (N. H.).
Cranch's Circuit Court ...	Cr. C. C.	Sprague	Spr.
Curtis	Curt.	Story	Story.
Dakota Territory	Dak. T'y.	Sumner	Sumn.
Dallas	Dal.	Taney	Taney.
Daveis	Dav.	Utah Territory	Utah T'y.
Day	Day (Conn.).	Vermont Reports	Vt.
Deady	Deady.	Wallace	Wall
Dillon	Dill.	Wallace's Circuit Court ...	Wall. C. C.
Federal Reporter	Fed. R.	Wallace, Jr.	Wall. Jr.
Fisher's Patent Cases	Fish. Pat. Cas.	Ware	Ware.
Flippin	Flip.	Washington	Wash.
Gallison	Gall.	Washington Territory	Wash. T'y.
Gilpin	Gilp.	Wheaton	Wheat.
Hempstead	Hemp.	Wheeler's Criminal Cases ..	Wheeler.
Hoffman	Hoff.	Woods	Woods.
Holmes	Holmes.	Woodbury & Minot	Woodb. & M.
Howard	How.	Woolworth	Woolw.
Hughes	Hughes.	Wyoming Territory	Wyom. T'y.
Law and Equity Reporter ..	Law & Eq. Rep.	Van Ness	Van Ness.
Legal Gazette Reports	Leg. Gaz. R.		

FEDERAL DECISIONS.

DEDICATION.

- I. IN GENERAL, §§ 1-7.
- II. STATUTORY, §§ 8-11.
- III. AT COMMON LAW, §§ 12-112.

I. IN GENERAL.

§ 1. *Who may be donee.*—Property may be dedicated to public use, and it is not essential that the right of use should vest in a corporate body; it may exist in the public, and no grantees need be designated or *in esse*. *New Orleans v. United States*, 10 Pet., 662. See §§ 83, 53.

§ 2. *Alluvion.*—Alluvial formations upon lands dedicated to a public use are subject to the same use. *Ibid.* See § 84.

§ 3. *Power of government.*—The rights formerly possessed by the French and Spanish sovereigns to regulate the use of lands dedicated to public purposes is vested in the states organized from the ceded territory and not in the federal government. *Ibid.*

§ 4. It is beyond the power of a sovereign to alienate land dedicated to public uses, as a common or quay, except under the power to appropriate property to the national use, and then compensation must be paid. *Ibid.* See §§ 78-83, 113.

§ 5. —of municipal authorities.—A city is not divested of its title to lands dedicated to public use, by the illegal action of the federal government solicited by the city authorities, especially if the latter are ignorant of their rights. *Ibid.*

§ 6. *Who may dedicate.*—No person other than the owner or his authorized agent can make a dedication of land under the statute or at common law. *Nelson v. City of Madison*, * 8 Biss., 244. See § 108.

§ 7. *Statute of limitations.*—No one can acquire by adverse occupation as against the public the right to a street or square dedicated to it. *Grogan v. Town of Hayward*, 6 Saw., 493 (§§ 73-77).

II. STATUTORY.

§ 8. *Formalities required.*—All the formalities prescribed are essential to effect a dedication under a statute. *Nelson v. City of Madison*, * 8 Biss., 244. See § 78.

§ 9. Where some of the forms of law have not been observed in making a dedication under the statute, the proceedings so far as they have gone are admissible to show a dedication at common law. *Sergeant's Heirs v. State Bank of Indiana*, * 4 McL., 339; *Bayliss v. Board of Supervisors*, * 5 Dill., 549; *Barney v. Keokuk*, * 4 Dill., 593; *Nelson v. City of Madison*, * 3 Biss., 244. See § 78.

§ 10. *Sufficient when.*—Recording a plat of a town, duly acknowledged by the proprietor to be correct, and having the surveyor's certificate indorsed, referring to a square as a public square, makes an effectual dedication under the Iowa statute. *Bayliss v. Board of Supervisors*, * 5 Dill., 549.

§ 11. *Limitation of use.*—The fee which a municipal corporation takes under a statutory dedication is subject to the trust impliedly or expressly designated by the donor. *Railroad Co. v. Schurmeir*, 7 Wall., 272. See §§ 28, 80, 113.

III. AT COMMON LAW.

SUMMARY—*Defined*, § 12.—*What is essential to*, § 13.—*In pais*, § 14.—*Evidence to establish*, § 15.—*Partial use*, § 16.—*What interest passes*, §§ 17, 18.—*Subsequently acquired title*, § 19.—*Effect of long user*, §§ 20, 21.—*Non-user*, § 22.—*Lapse of time*, § 23.—*When revocable*, §§ 24, 25.—*Sales by map*, § 26.—*Acceptance by public*, § 27.—*Diversion; corporate and state authority; eminent domain*, § 28.—*Reverter*, § 29.—*Remedy in equity*, § 30.—*At law*, § 31.

§ 12. A dedication of land for public purposes is simply a devotion of it, or of an easement in it, to such purposes, manifested by the owner by some clear declaration of the fact. *New Orleans v. United States*, §§ 82-51; *Cincinnati v. White*, §§ 52-59; *Grogan v. Town of Hayward*, §§ 73-77. See § 85.

§ 13. No particular form or ceremony is necessary in the dedication of land to public use. All that is required is the assent of the owner and enjoyment by the public for the purpose intended by the appropriation. *Cincinnati v. White*, §§ 52-59. See §§ 85, 86.

§ 14. A dedication to public uses need not be by deed or writing; it may be by parol. *Ibid.* See §§ 91, 92.

§ 15. The declarations of an agent, made at the time of laying out a town, and forming part of the transaction, are admissible to prove a dedication of land to public uses and the boundaries thereof. *Barclay v. Howell*, §§ 60-69.

§ 16. Where an agent, at the time of laying out a town, declared a certain part thereof to be dedicated to public uses, and the part so designated was for thirty years so used by the public, a grant to public uses of the whole land designated may be presumed. *Ibid.*

§ 17. Query: Does the proprietor of a town retain the fee in the streets, etc.? *Ibid.*

§ 18. It is not essential, in a dedication of land to public uses, that a fee should pass to secure the easement to the public. *Cincinnati v. White*, §§ 52-59. See § 108.

§ 19. Where one having only an equitable title dedicates land to public use and subsequently acquires the legal title, a continuing assent by him to the dedication may be considered an affirmation of the first appropriation. *Ibid.* See §§ 102-104.

§ 20. Use by the public for such length of time, less than the period necessary to gain the right by prescription, that the public accommodation and private rights might be materially affected by an interruption of the enjoyment, may raise the presumption of a dedication. *New Orleans v. United States*, §§ 32-51. See §§ 64, 72, 87-90.

§ 21. The presumption of a dedication from long user is not destroyed by proof of occasional and slight interruptions not interfering with the proper use of the ground by the public or of government grants unadvisedly made and in derogation of vested rights. *Ibid.*

§ 22. User is not necessary to a dedication to public uses, but non-user is admissible to disprove such dedication. *Barclay v. Howell*, §§ 60-69.

§ 23. A dedication to public uses must rest upon the clear assent of the owner in some way, not merely on lapse of time. *Irwin v. Dixon*, §§ 70-72.

§ 24. If a dedication to public uses is not acted upon it may be recalled at the pleasure of the owner. But if the dedication be accepted by the public authorities, and others acting upon a supposed appropriation of the property to the uses indicated would be injured by its revocation, the dedication becomes irrevocable. *Grogan v. Town of Hayward*, §§ 73-77.

§ 25. The original owner cannot resume land once set apart for public use and enjoyed as such. *Cincinnati v. White*, §§ 52-59.

§ 26. A purchaser of property by reference to a map filed takes not merely the grantor's interest in the land described in his deed, but as appurtenant to it an easement in the streets and public ground named, with an implied covenant that subsequent purchasers should be entitled to the same rights. *Ibid.* See §§ 93-99.

§ 27. No formal acceptance by the public authorities of a dedication is required to preclude its revocation. *Ibid.*

§ 28. Property specifically dedicated to particular public uses cannot be diverted therefrom either by municipal or state authority, except by the exercise of the power of eminent domain. *United States v. Illinois Central R. Co.*, §§ 78-83. See §§ 4, 113.

§ 29. When land dedicated to a particular purpose is appropriated to an entirely different purpose it does not revert to the original owner, but the use remains in the public limited only by the conditions imposed in the grant, which may be enforced in equity. *Barclay v. Howell*, §§ 60-69.

§ 30. The owner of land subject to the use conferred upon the public by a dedication to special purposes may prevent, by a bill in equity, a diversion of the land from the purposes designated. *United States v. Illinois Central R. Co.*, §§ 78-83. See §§ 4, 11, 113.

§ 81. The holder of the naked fee cannot maintain ejectment for the land dedicated to public use by the equitable owner, because a recovery by him would be inconsistent with uninterrupted enjoyment by the public, but he may sue in trespass or case for a private injury. *Barclay v. Howell*, §§ 60-69.

[Notes.—See §§ 84-118.]

NEW ORLEANS v. UNITED STATES.

(10 Peters, 662-737. 1836.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This case is brought before this court by an appeal from the decree of the district court for the eastern district of Louisiana.

Under a practice which is peculiar to Louisiana, the attorney of the United States, on their behalf, presented a petition to the court, which represented that the mayor of the city of New Orleans, in pursuance of an ordinance of the city council, had advertised for sale, for a day then past, and was about to advertise anew for sale, in lots, the vacant land included between Ursuline levee and Garrison streets and the public road in the city of New Orleans; and also the vacant land included between Custom-house levee and Bienville street and the public road in the said city. And the petitioner further stated that, by the treaty of cession (8 Stats. at Large, 200) of the late province of Louisiana by the French republic to the United States of America, the United States succeeded to all the antecedent rights of France and Spain, as they then were, in and over the said province; the dominion and possession thereof including all lands which were not private property; and that the dominion and possession of the said vacant lands, ever since the discovery and occupation of the said province by France, remained vested in the sovereign; and had not, at any time prior to the date of said treaty, been granted by the sovereign to the city. And the petitioner prayed for an injunction to restrain the city council from selling the land, or doing any other act which shall invade the rightful dominion of the United States over said land, or their possession of it; and a perpetual injunction was prayed.

To this petition the mayor, aldermen and inhabitants of the city answered, and denied the material facts and allegations in the petition; and they specially denied that the dominion and possession of the land, at the time Louisiana was ceded to the United States, were vested in either the king of Spain or the sovereign of France, either as vacant land or under any other denomination.

And in a supplemental answer, the respondents say that the inhabitants of the city of New Orleans are the true and lawful proprietors of the vacant lots they have been enjoined not to sell.

1. "Because all the space of ground which exists between the front line of the houses of the city and the river Mississippi was left by the king of France, under the name of quays, for the use and benefit of the inhabitants of the city.

2. "Because if, since the foundation of the city of New Orleans, said space of ground became wider than was necessary for the public use and the quays of the city, it was in consequence of an increase formed by alluvion in the greatest part of the front of the city; and the works which were necessarily made from time immemorial by the inhabitants of the city, or at their expense, to the levee in front thereof, to advance it nearer to the river than it was formerly.

3. "Because, by the laws of Spain which were in force at the time when said alluvions were formed and said works were made, alluvions formed by

rivers in front of cities belonged to the inhabitants thereof; who may dispose of the same as they think it convenient, on their leaving what is necessary to the public use."

And the respondents say that the vacant lots are of great value, and cannot be disposed of unless they shall be indemnified by the government, etc. A general replication was filed by the district attorney in behalf of the United States. Statements of facts signed by the parties appear in the record.

If this cause be considered on the broad ground on which it is presented by the facts and the arguments of counsel, it is one of great importance. In one view, the title to property of the value of several millions of dollars depends upon its decision; and, in any aspect in which it may be considered, principles of the civil law, and the usages and customs of the governments of France and Spain; and also, it is insisted, important principles of the common law, as well as the effect of certain acts of our own government, are involved.

In the able arguments which have been heard at the bar, these topics have been elaborately examined and variously illustrated; and it now becomes the duty of the court to pronounce their opinion in the case. Being constituted the organ of that opinion, the matters in controversy will be considered under the following arrangement: 1. The rights of the plaintiffs in error by the principles of the common law. 2. Their rights under the laws and usages of France and Spain. 3. The interest of the United States in the property claimed by the city, and their jurisdiction over it.

§ 32. *Property may be dedicated to the use of the public. Need not be vested in a corporate body.*

That property may be dedicated to public use is a well established principle of the common law. It is founded in public convenience, and has been sanctioned by the experience of ages. Indeed, without such a principle, it would be difficult, if not impracticable, for society, in a state of advanced civilization, to enjoy those advantages which belong to its condition and which are essential to its accommodation. The importance of this principle may not always be appreciated, but we are in a great degree dependent on it for our highways, the streets of our cities and towns, and the grounds appropriated as places of amusement or of public business, which are found in all our towns, and especially in our populous cities. It is not essential that this right of use should be vested in a corporate body; it may exist in the public, and have no other limitation than the wants of the community at large.

§ 33. *Authorities reviewed.*

This court had occasion to consider this doctrine in two important and leading cases which lately came before them, and which are reported in 6 Peters. The first one was *The City of Cincinnati v. The Lessee of White*, 6 Pet., 431 (§§ 52-59, *infra*). In 1789 the original proprietors of Cincinnati designated, on the plan of the town, the land between Front street and the Ohio river as a common for the use and benefit of the town forever. A few years afterwards a claim was set up to this common by a person who had procured a deed from the trustee in whom the fee of the land was vested, and who had entered upon the common and claimed the right of possession. The proof of dedication being made out to the satisfaction of the court, they sustained the rights claimed by the city. At the time the plan of the city was adopted by the proprietors, and this ground was marked on the plat as a common, they did not in fact possess the equitable title to the space dedicated; but they shortly afterwards purchased the equitable title, and it was held that, under

the purchase, the prior dedication was good. In their opinion the court refer to a great number of decisions of this court and others, in this country, and also of the highest courts in England, to sustain the principles upon which the decision was founded. The doctrine is now so well settled and so generally understood that it cannot be necessary to cite authorities in support of it.

In the case of *Barclay v. Howell's Lessee*, 6 Pet., 498 (§§ 60-69, *infra*), the same principle was sanctioned as applicable to facts somewhat variant from those which constituted the *Cincinnati* case.

In 1784 the representatives of William Penn, in whom the proprietary right of Pennsylvania was vested, by their agent, laid out the town of Pittsburg. The original plan of the town, the court say, "shows that it was laid out into lots, streets and alleys from the junction of the Alleghany and Monongahela rivers, extending up the latter to Grant street. With the exception of Water street, which lies along the bank of the Monongahela, all the streets and alleys of the town were distinctly marked by the surveyor, and their width laid down. Near the junction of the rivers the space between the southern line of the lots and the Monongahela river is narrow, but it widens as the lots extend up the river. From the plan of the town it does not appear that any artificial boundary, as the southern limit of Water street, was laid down. The name of the street is given and its northern boundary, but the space to the south is left open to the river. All the streets leading south terminate at Water street, and no indication is given in the plat, or in any part of the return of the surveyor, that it did not extend to the river, as it appears to do by the face of the plat."

And the surveyor being dead, his declarations at the time of making the survey that Water street should extend to the river were sanctioned as evidence; and it appearing that the convenience of the town required the extension of this street to the river, and there being no statement or line marked on the plat of the town as opposed to it, and as the public, for thirty years or more, in some parts of the town, had thus used the street, and that property had been bought and sold in reference to it in this form, it was held to be sufficient evidence of its having been dedicated to the public. The street thus extended afforded a large and convenient space for commercial purposes along the shore of the river, beyond what was required for a street.

On the 26th of September, 1712, about thirty-eight years after Louisiana had been taken possession of by Lasalle, in the name of the king of France, a charter was granted by the king to Crozat conferring on him exclusive rights, for commercial and other purposes, over a great extent of country, which included the territory that now forms the state of Louisiana. The absolute property in fee-simple was vested in him of all the lands he should cultivate, with all buildings, etc., he taking from the governor and intendant grants, which were to become void on the land ceasing to be improved. The laws, edicts and ordinances of the realm, and the custom of Paris, were extended to Louisiana. This charter was afterwards surrendered by Crozat to the king, and a new one was granted on the 6th of September, 1717, to a corporation styled the Western Company. The land, coasts, harbors and islands in Louisiana were granted to this company, as they had been to Crozat, "it doing faith and homage to the king and furnishing a crown of gold, of the weight of thirty marks, at each mutation of the sovereignty."

The power is given to this company to grant land allodially. And under its auspices, the ground where the city of New Orleans now stands was

selected as a place for the principal settlement of the province. A short time afterwards, the foundation of the city was laid, by the construction of a few huts and other improvements. In 1724, and also in 1728, by the facts proved, it seems, maps of the town were made, on which the vacant space, now in controversy, was designated by the name of quay. The Western Company continued to act under its charter until January, 1732, when, with the king's leave, the charter was surrendered, and a retrocession was made by the company of the "property, lordships and jurisdiction of Louisiana." The town of New Orleans was established, and the plan, as designated in the maps referred to, adopted while the country was under the jurisdiction of the Western Company; and the dedication to public use, of the vacant space in contest, was made by it, so far as a dedication is shown by the plan and the indorsement of the word quay upon it.

§ 34. "*Quay*" defined.

In the agreed facts, a quay is admitted to be a vacant space between the first row of buildings and the water's edge, and is used for the reception of goods and merchandise imported or to be exported. In the Civil Code of Louisiana, a quay is said to be "common property, to the use of which all the inhabitants of a city, and even strangers, are entitled in common, such as the streets and public walks." The term is well understood in all commercial countries; and whilst there may be some differences of opinion as to its definition, there can be little or none in regard to the popular and commercial signification of it. It designates a space of ground appropriated to the public use; such use as the convenience of commerce requires.

§ 35. *When dedication is presumed.*

This entire vacant space has been used for the purposes to which it was appropriated, with but occasional and slight interruptions to small portions of it, from the establishment of the designation of the quay in 1724, until the present time. The interruptions referred to were not such as deprived the public of the proper use of the ground. They were generally of a temporary nature, and were permitted, where private accommodation was in some degree connected with the public convenience. Temporary shops and baths, which were constructed upon this ground, were of this character. The public established, at different times and for different purposes, buildings of a more permanent description; but these were rendered necessary for the public service, and they seem not to have encroached, to any injurious extent, on the public use of the quay. Some of these buildings have long since disappeared, and any of them which may still remain do not subject the city or the public to any inconvenience.

The city authorities, at an early day, would scarcely be expected to object to the construction of barracks on this space, for the accommodation of the soldiers, which were there stationed for the protection of the city. And much less would they be expected to object to the use of the common for the occasional performance of military evolutions. The custom-house and public warehouse, erected on this ground by the Spanish government, have disappeared; and the construction of the present custom-house on the quay, by the federal government, in 1819, cannot be considered as affecting the original dedication. It may be convenient for the city to have the custom-house situated on this ground, and it does not interrupt the public use.

Two or three grants to small lots of ground within this common were made under the Spanish authorities; but under the present head of inquiry, it

is unnecessary to examine whether these acts were not the exercise of arbitrary power by the Spanish officers, and, being in derogation of vested rights, should not be held as nullities. If these titles were given in the exercise of a discretion, still they would not go to abrogate a vested right, only to the extent of the titles. But this question will be more particularly examined hereafter. Suppose, on the common at Cincinnati, or on the vacant space connected with Water street at Pittsburg, it had been proved that the state had constructed a custom-house, or temporary barracks, would such acts have been considered as disproving a dedication? Clearly they would not; nor would grants for one or two lots within either space, unadvisedly issued, and in derogation of vested rights, have been so considered. The title to Penn and his heirs was allodial, and we have seen that the Western Company was authorized to make such titles. Like the heirs of Penn, the Western Company was proprietor of a great extent of territory, and the dedications were made under circumstances somewhat similar; but the proof of dedication of the common or quay at New Orleans is incomparably stronger than was found in the Pittsburg case.

§ 36. *Alluvial formations upon lands dedicated to public use.*

It appears that this quay has been greatly enlarged by the alluvial formations of the Mississippi river, and from this fact an argument is drawn against the right of use in the city, at least to the extent asserted. The history of the alluvial formations by the action of the waters of this mighty river is interesting to the public, and still more so to the riparian proprietors. The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss in this way, he cannot be held accountable for his gain. This rule is no less just when applied to public than to private rights. The case under consideration will illustrate the principle.

If the dedication of this ground to public use be established by the principles of the common law, is it not of the highest importance that the accumulations of the vacant space by alluvial formations should partake of the same character and be subject to the same use as the soil to which it becomes united?

If this were not the case, by the continual deposits of the Mississippi the city of New Orleans would, in the course of a few years, be cut off from the river, and its prosperity impaired. If the city can claim the original dedication to the river, it has all the rights and privileges of a riparian proprietor.

§ 37. *Ancient maps and a century's use by the public of land prove a dedication.*

But there is another consideration of great weight on this subject. It appears that the city, from time immemorial, has been compelled to construct at great expense, and keep in repair, levees, which resist the waters of the river and preserve the city from inundation. If it were not for these levees or embankments, it appears from the facts proved that not only the city of New Orleans, but the country, to a great extent, bordering on the lower Mississippi, would be uninhabitable. These works resist the current of the river, eddies are formed and the deposits rapidly accumulate. In this way has the vacant space been greatly enlarged within twenty or thirty years past. This enlargement of the quay cannot defeat or impair the rights of the city, and the

question only remains to be answered, whether the facts in this case, by the principles of the common law, show a dedication of this vacant space to public use. No one can doubt that the answer must be in the affirmative.

The original dedication is proved by the maps in evidence and by a public use of more than a century. These facts are conclusive. The right of the city is sanctioned by time and established by uncontroverted facts. No case of dedication to public use has been investigated by this court, where the right has been so clearly established. What effect the acts of the federal government and the acts of the corporation of the city may have upon this right will be considered in another branch of this case.

§ 38. *In Louisiana the laws of France and Spain control rights which arose under them.*

As the rights claimed by the city had their origin under the laws of France, and were enjoyed for nearly forty years under the laws of Spain, it becomes necessary to examine those laws to ascertain the nature and extent of these rights. On this ground the claims of the city have been earnestly and ably, if not confidently, resisted in the argument. The laws of France and of its colonies, it is admitted, prevailed in Louisiana from its first settlement until the 25th of November, 1769, when they were abrogated by O'Reilly, captain-general under the king of Spain. On the part of the defendants in error, it is contended that the corporation of the city has no title whatever to the soil or to the use of the premises in question; and great reliance is placed on a decision lately made by the supreme court of Louisiana, in the case of C. G. De Armas and M. S. Cucullu v. The Mayor, Aldermen, etc., of the City of New Orleans, 5 La., 132. Two of the three learned judges who compose that court lay down principles, in their opinions in that case, which are inconsistent with the right asserted by the city in this case; and it is insisted that this decision, which disaffirmed the right set up by the city, is conclusive on this court.

§ 39. *When decisions of state courts do not bind federal courts. Power of the French sovereign over lands dedicated to public uses.*

So far as the present controversy may be supposed to arise under the laws of the United States, or the treaty of cession, it is clear that the decision of the Louisiana court cannot be considered as settling the question. In the argument on behalf of the government, the principle is laid down that, by the laws of France, a city or town could not acquire a right or title to the soil of immovables, or to the use of them, without letters-patent from the king. And Domat, with other authorities, is referred to, who, in treating of communities, declare, as a primary rule, that they should be established for the public good and by order or permission of the prince. By the third section in the statement of facts it appears that towns in the French colonies were never incorporated like those of the United States; they are founded in virtue of orders emanating from the government, or from the minister of marine, and transmitted to the governors of the colonies, and their administration was confided to intendants, who had authority to enact the necessary public regulations.

It is insisted that no reasons are assigned why the law of France was not complied with, by issuing a grant, if the dedication of this common was in fact made. That the plan of the town may be presumed to have been made, and the ground in contest designated, as appears on the maps, for other purposes than those supposed by the city authorities. That the maps were for a long time lost sight of, and could not have been considered as evidence to supply the place of a grant; had this been the case, they would have been pre-

served with care. But the most conclusive argument against this dedication is, it is said, that until the town was incorporated by letters patent, it was incapable of taking by grant. And the decision of the supreme court of Louisiana is referred to as sustaining this doctrine.

Great respect is due to the opinions of the two learned judges who made this decision, and especially on questions arising under the civil law, with the principles of which they must be familiar. Still, it would seem that a ready answer may be found to at least some of the objections stated by the counsel. In the first place the dedication of this common was made by the Western Company, who had power to make grants; and ignorance of their rights, by the inhabitants of the city, or of the necessary evidence to establish them, affords no very satisfactory proof against the existence of those rights. And, if reasons can be assigned why this ground was designated on the plat as a quay, which show that such indorsement could not have been designed as a substitute for a grant, yet, in the absence of satisfactory reasons, is it not fair to presume in favor of a servitude which has been enjoyed by the city for more than a century? Whether the retrocession of Louisiana, its jurisdiction, etc., by the Western Company to the king of France, could affect the rights previously granted by it, may be hereafter considered.

§ 40. *Power of sovereign over streets.*

It is admitted that the power of the sovereign over the streets of a city is limited. He cannot alien them, nor deprive the inhabitants of their use, because such use is essential to the enjoyment of urban property. And a distinction is drawn, in this respect, between the streets of a city and other grounds dedicated to public use. The latter, it is contended, is not only under the supervision of the king, as to its use, but he may sell and convey it. Now, it would seem, in reason, that the principle is the same in both cases. The inhabitants of a town cannot be deprived of their streets, as the streets are essential to the enjoyment of their property. In other words, by closing the streets the value of the buildings of the town would be greatly reduced, if not entirely destroyed. And if ground dedicated to public use, which adds to the beauty, the health, the convenience, and the value of town property, be arbitrarily appropriated by the sovereign to other purposes, is not the value of the property which has been bought and sold in reference to it greatly impaired? The value may not be reduced to the same ruinous extent as it would be to close the streets, but the difference is only in the degree of the injury, and not in the principle involved.

Domat, liv. 1, title 8, section 1, article 1, says, there are two kinds of things destined to the common use of men, and of which every one has the enjoyment. The first are those which are so by nature; as rivers, the sea and its shores. The second, which derive their character from the destination given them by man; such as streets, highways, churches, market-houses, court-houses and other public places; and it belongs to those in whom the power of making laws and regulations in such matters is vested, to select and mark out the places which are to serve the public for these different purposes." But, it is said, if the dedication was made by the king, the citizens of New Orleans, or the public, did not acquire a right paramount to his. And that having a right to regulate the use, and the fee never having been conveyed by him to the city, by grant or otherwise, he must of course retain the power of disposing of the property.

The right of the king to this property is compared to the right of a city,

which is vested with the fee and the use; and as in such case the corporation may dispose of the property dedicated with the sanction of the sovereign power, the sovereign, it is contended, having the right of property and the power to regulate the use, may alien. And it is said that this supervision of the use by the king was a doctrine peculiarly applicable to Louisiana and the city of New Orleans, where the changes are so frequent by the continual formations on the shores of the Mississippi, in addition to increase of population and business, which often require alterations in the streets and other public places. Though certain places may be dedicated to public purposes by the supreme power, and may be said to be withdrawn from commerce, still, it is insisted, where no grant has been made, and private rights have not become vested in the property, it is not withdrawn from the sovereign power.

This argument goes upon the fact that the title to the quay remained in the king of France, which is a controverted point. That the king, under the law of nations, was entitled to the right of soil of Louisiana, is not contested. The same rights belonged to the sovereign of France, in this respect, as have been accorded to other European sovereigns who made discoveries on this continent; but the conclusion which is drawn from this, that, as no grant was given, the king had a right to alien the ground in contest, the same as any other part of Louisiana, is not admitted. This argument in behalf of the power of the king of France over the common is founded upon the supposition that the cession of the country to the king by the Western Company destroyed the rights which had become vested under it; and also, that as no grant for the land in contest has been proved, none can be presumed.

§ 41. *The doctrine of presumption is recognized in the civil law.*

The doctrine of presumption is as fully recognized in the civil as it is in the common law. It is a principle which no enlightened tribunal in the search of truth, and in applying facts to human affairs, can disregard. The retrocession of Louisiana to France by the Western Company did not abrogate the rights which had been acquired under it. All the grants to individuals made by the company were respected; and there is no act by the French government, from the foundation of the city to the transfer of the country in 1769 to Spain, which shows that this dedication was not as much respected and sanctioned by the king as were the grants to private citizens. Does not this long acquiescence of the monarch, and enjoyment of the property by the city, afford some evidence of right? But in addition to this consideration, it appears in evidence that, from the time the plan of the city was adopted until the country was ceded to Spain, numerous transfers of property were made, in which the property is described as being bounded by this quay; and also, many official transactions of public officers, in which the quay is recognized and referred to. This shows in what light this vacant space was considered by the public for nearly fifty years after the dedication was made; and it is not probable that this subject could have been wholly overlooked by the king. The plan of the city, containing the designation of this quay, was published by Charlevoix in his *Histoire de la Nouvelle France*, and perhaps by Voltaire. It is true that New Orleans contained at this time a very limited population; but it is matter of history that, not many years after the foundation of the city was laid, the most splendid scheme of commercial enterprise, connected with banking operations, was projected in France, in reference to Louisiana. So excited did the public mind become on this subject, and so generally was the public attention directed to it, that there is little probability the dedication of this common

could have escaped the notice of the king of France. It was not, probably, deemed too large for the accommodation of a city which was to become the emporium of a country of such vast resources. The public use of this common for so great a number of years, and the general recognition of it from the time it was dedicated, in numerous private and official transactions, and the acquiescence of the French king, afford no unsatisfactory evidence of right. If a grant from the king were necessary to confirm the claim of the city, might it not be presumed under such circumstances?

§ 42. *Power of the king of France to alienate lands dedicated to public uses, doubted.*

But suppose the dedication had not been made by the Western Company, and the title were admitted to be in the king, as decided by the supreme court of Louisiana; is it clear that he had the power to alien the ground at pleasure? It cannot be insisted that the dedication of this property to public use, whether the title to the thing dedicated became vested in the city, or its use only, could withdraw it from the political jurisdiction of the sovereign power. This would place property of this description on a higher and more sacred principle than private property. But in no point of view can this be the case.

That a jurisdiction to a limited extent was exercised by the king of France over the quays of Paris and the public grounds of other cities in the kingdom, such as permitting buildings to be constructed thereon, and regulating the manner and extent of such occupancy, is admitted; but this power seems to have been in the nature of a police regulation, and was so exercised as was not incompatible with the public use of the grounds. This authority, however, does not prove that the fee or the right of use was not in the public, or that the king had power to convey the lands. Domat says, "rivers, their banks, highways, are public places which are for the use of all according to the laws of the country. They belong to no individual, and are out of commerce; the king only regulates the use of them." And again, in vol. 2, lib. 1, tit. 8, §§ 2, 3 and 16: "We class public places as out of commerce; those which are for the use of the inhabitants of a city, or other place, and in which no individual can have any right of property; as the walls, ditches or gates of a city, and public squares."

In Domat, vol. 2, b. 1, tit. 8, § 2, art. 19, it is said: "If it should happen that some buildings on a public square should be constructed, they might either be demolished if they should prove any way hurtful or inconvenient, or be suffered to stand upon condition of their paying a rent, or making some other amends to the public, if found to be more advantageous to let them remain, either because they would be an ornament to a market-place, or other public place, or because of the rent they would yield, or other advantages that might be made of them."

Judge Martin, who dissented from the opinion of the superior court in the case above cited, says "of public places, the public may claim the use by exhibiting evidence of a dedication to its profit by the sovereign or *pater familias* without any letters-patent, grant or deed." And "of places which are alleged to be the exclusive property of the town or city, or of which the exclusive right to use it is claimed, letters-patent, a grant or deed must be produced."

The power of appropriating private property to public purposes is an incident of sovereignty. And it may be, that by the exercise of this power, under extraordinary emergencies, property which had been dedicated to public use, but the enjoyment of which was principally limited to a local

community, might be taken for higher and national purposes, and disposed of on the same principles which subject private property to be taken. In a government of limited and specified powers like ours, such a power can be exercised only in the mode provided by law; but in an arbitrary government the will of the sovereign supersedes all rule on the subject. .

§ 43. *The laws of Spain made alienations of lands dedicated to public uses void.*

But it must be admitted that while the French laws and usages may show the nature and extent of the right of the public to this common as it was originated and regulated by them for nearly half a century, yet it is to the Spanish laws and usages we must chiefly look in determining this head of the controversy. From the abrogation of the French laws in Louisiana by O'Reilly in 1769, until the country came into the possession of the United States, the laws of Spain acted upon and governed the rights in controversy. The retrocession of the country from Spain to France, and the cession of France to the United States, followed so soon afterwards, that these transfers, it is admitted, caused no interruption to the laws of Spain.

Louisiana was ceded by France to Spain without any abridgment of the vested rights to property enjoyed by private individuals or communities. The rights of the city of New Orleans were in no respect affected by this cession, unless they have been affected by the action of the Spanish laws, and we will now examine this point. The fundamental laws of the Spanish nation, and which are understood to be alike binding on the king and the people, are found in the Partidas and the Recopilacion.

The ninth law, tit. 20, of Partida 3, contains the following: "The things which belong separately or (severally) to the commons of cities or towns are fountains of water, the places where the fairs or markets are held, or where the city council meet, the alluvions or sand deposits on the banks of rivers, and all the other uncultivated lands immediately contiguous to the said cities, and the race grounds, and the forests and pastures, and all such other places which are established for the common use." The twenty-third law, tit. 32, of Partida 3, is as follows: "No one ought to erect a house or other building or works in the squares, nor on the commons (exidos), nor in the roads which belong to the commons of cities, towns or other places, for as these things are left for the advantage or convenience and the common use of all, no one ought to take possession of them, or do, or erect any works there for his own particular benefit; and if any one contravenes this law, that which he does there must be pulled down and destroyed; and if the corporation of the place where the works are constructed choose to retain them for their own use, and not pull them down, they may do so; and they make use of the revenue they derive therefrom in the same manner as any other revenues they possess; and we moreover say, that no man who has erected works in any of the above-mentioned places can or shall acquire a right thereto by prescription."

In the Recopilacion, law 1, b. 4, title 15, is the following: "Whereas, in our kingdoms, persons hold and possess some cities, towns, villages and civil and criminal jurisdiction without any title from us, or from the kings our predecessors; and it has been doubted whether the same could be acquired against us and our crown by any time; we do ordain and command, that immemorial possession, proved in the manner and under the conditions required by the law of Toro, which is law the first, tit. 7, b. 5, of this Recopilacion, be sufficient to acquire against us and our successors, any cities,

towns, villages, use or jurisdiction, civil or criminal, and thing or part thereof annexed or belonging thereto. Provided, that the time of said prescription be not interrupted by us, or by our command, naturally or civilly. But the supreme, civil or criminal jurisdiction which kings have, by their sovereignty and kingly power, which consists in exercising and having justice done, when other lords and judges do not; we do ordain that this cannot be acquired or prescribed by the said time or any other; and likewise what the laws say cannot be acquired by time, must be understood of the imposts and tributes coming to or owing to us."

And again, Recopilacion, law 1, tit. 7, b. 5, is the following law: "We do ordain that the *mayorazgo* [*mayorat* of the French, entail in English] may be proved by the instrument of its institution, together with the written permission of the king who authorized it, provided the said instruments are authenticated; or by witnesses, who testify in the form required by law to the tenor of the same, and likewise by immemorial custom proved, establishing that the former possessors have held and possessed the property or *mayorazgo*; that is to say, that the eldest legitimate sons and their descendants used to inherit said property, as such, when the holder thereof left other son or sons, without leaving them anything equivalent to what those who succeeded to the *mayorazgo* received; provided the witnesses be of good reputation and declare that they have seen it thus for forty years, and heard their seniors say that they always saw it and never heard the contrary said, and that it is a matter of public voice, notoriety and opinion amongst the inhabitants or residents of the place."

In the Novissima Recopilacion, b. 7, tit. 16, law 1, is the following: "Our pleasure and will is to preserve their rights, rents and property to our cities, towns and places, and not to make any gift of anything of them; wherefore we command that the gift or gifts which we may make, or any part of them, to any person whatsoever, are not valid." A faithful observance of these laws would have preserved the rights of the city, as to the common, free from invasion. No law was cited in the argument which showed the power of the king of Spain to alienate land which had been dedicated to the public use, and it is clear that the exercise of such a power would have violated the public law, which is understood to have limited the exercise of the sovereign power in this respect.

The king of Spain, like the king of France, had the power to give permission to construct buildings on grounds dedicated to public use, without injury to the public rights; but this does not show that either sovereign had the power to alien such lands. In the third Partida, law 3, tit. 32, the sovereign was authorized to grant permission to build on public places. And the comment of Rodriguez, 15 and 16, is that the building must be so constructed that no one should be injured in his right thereby, because the privileges granted by princes are understood to be granted without prejudice to third persons.

On the 22d February, 1770, O'Reilly, governor, etc., of Louisiana, published an ordinance, in conformity to law, "to designate city properties and rents belonging to the city of New Orleans," and among other regulations "\$6 were required to be paid by each boat of the tonnage of two hundred tons, etc., for right of anchorage, established and destined to the keeping in repair of the levee or dyke, which does contain the river within its limits, in the whole front of the city," etc. This regulation was to continue during the pleasure of his majesty.

As power was given to the king of Spain, by law, to grant permission to build on public places, it would seem to follow that such places were not only withdrawn from commerce but that the king could not alien them. For if he had the power to do this, in as unlimited a manner as over the crown lands, it would include the exercise of every minor authority over them. If he could sell and convey the lands dedicated to public use, surely he might, without any authority of law, grant permission to build on such lands. But, as it appears from the evidence in this case that permission was not only given to construct buildings on this common, but that a part of it was granted in fee, it is contended that this is evidence of the king's power not only to regulate the use of this common but to convey it in fee. And the leading case of Arredondo, 6 Pet., 691, is referred to as sanctioning the principle that a grant, issued by a Spanish functionary, is not only evidence of title but also that the officer had the power to issue it. In that case this court did hold, and the same principle has been sanctioned in numerous cases since, that a grant should be considered as *prima facie* evidence that it was rightfully issued, but that it might be impeached by any one who set up an adverse claim.

We will examine the grants made under Spanish authority to any part of this common, and other acts of jurisdiction over it exercised by the government of Spain, which has been proved by the evidence. On the 14th of June, 1792, Carondelet, governor, intendant, etc., granted to Liotaud a lot of ground situated within this common; and in the grant he says, "making use of the power which the king has vested in us, we grant in his royal name," etc. And on the 10th of August, 1795, another grant was made of a lot in the common to Mentzinger by the same governor.

In 1793, Arnaud Magnon, a master carpenter, represented by petition to the governor and intendant-general that he had built a barge for the public, and as a compensation therefor he asked eighteen or nineteen feet on one side of his house to enlarge it, the same being very small, and that the same was granted to him, but that he had no instrument of writing as evidence of the same, and which he solicits. And he also represented to the intendant-general that his dwelling-house having been included in the conflagration of 1788, that Governor Miro permitted him to construct a small house near the river, "on the inner side of its dyke," and in consequence of this misfortune, and his having built a barge, etc., a small portion of land of eighteen to nineteen feet adjoining his house had been granted to him. That he was afterwards allowed to build a shed for the convenience of ship-buildings, etc., and he prays that a title may be granted to him for the lot.

This petition was submitted to the attorney-general, who reported that it appeared to him, "it would be an act of injustice to refuse the petitioner the corresponding titles of property that he solicits;" for, "although the council of this city might have some objection on account of the said lot being situated within its precincts, this opposition may be easily overcome, by the certainty that if Magnon did not occupy the said lot it would be necessary that another should occupy it, owing to the necessity and usefulness of said ship-yard to the public." It does not appear that this claim was ever carried into grant by the Spanish authorities.

In 1783, on the petition of Etienne Planche, who represented himself to be a carpenter and calker, and having much work which he could not do in his yard, etc., he asked permission to build a shed in front of his house, which was not to be closed, etc. This leave was given, and he and those claiming

under him occupied the ground for many years, but no grant was ever obtained from the Spanish governor for the lot. Catharine Gonzales, widow of Bertrand, set up a claim; and it appears that on the petition of her former husband, he was permitted to rebuild his house on the common, which had fallen into decay, which was allowed by the governor, etc. But no grant was ever issued by the Spanish authority for this lot.

These permissions to build were given by the governor and intendant, under the law which has been cited, that authorized the sovereign to grant permission to construct buildings on the public grounds. This was not considered inconsistent with the public use, as the power was not to be exercised to the prejudice of third parties. The three lots for which grants were issued, it must be admitted under the circumstances, is such a final disposition of the property as is wholly incompatible with the public right. For the fee of these lots was not only granted, but also the use. This transfer of the fee, it is contended, affords conclusive evidence that the title to the common remained in the king, and having in addition to this the power to regulate its use, he could alien it at pleasure.

If this power was possessed by the king, why was the authority given in the law which has been stated, to grant permission to construct buildings on public grounds? This power, as appears from the record, was exercised over the common in controversy, and only in three instances were lots granted absolutely. In the case of *The Mayor, etc., of New Orleans v. Bermudez*, decided by the supreme court of Louisiana (3 Martin, 309), the court say: "However contradictory these expressions may appear to be, the worst conclusion which can be drawn therefrom against the city of New Orleans is, that they had not that kind of possession which is the consequence of an absolute right of ownership. Yet, the sovereign having never thought fit to exercise any further right over these commons, and the claim of the city to them having been recognized and confirmed by the successor of that sovereign, the inhabitants of New Orleans must be considered as having never ceased to be the rightful possessors of that land," etc.

And in the same book, 303, the court say: "In the year 1795, the Baron Carondelet, then governor of Louisiana, for the king of Spain, granted to Henry Mentzinger, the appellee, a lot of ground, situated in the city of New Orleans, close to the levee, etc. But the appellants contend that the spot on which it is located is part of the public highway, and, therefore, could not have been lawfully granted for private use, even by the king himself. That public places, such as roads and streets, cannot be appropriated to private uses, is one of those principles of public law which required not the support of much argument. Nor is there any doubt that if, by a stretch of arbitrary power, the preceding government had given away such places to individuals, such grants might be declared void.

"But is this grant located in a street or on the public road? On this important question of fact, the evidence, produced by the appellant, is 'by no means satisfactory.' They show that, according to general usage in this country, the public road in front of the river is close to the levee. But could there be no derogation from that usage? Was that usage observed within the city of New Orleans? Does not the convenience of placing markets and other public places as near the water as possible, as it is recommended by the law of the Indies, make it necessary to deviate from such usages in cities? General usage, however, is the only ground on which the appellants rest their preten-

sions. No plan of the city has been exhibited, to show that the lot of the appellee is located upon a place which had been reserved for public use; no testimony has been adduced to prove that this spot is part of the ground laid out for the public road. We are called upon to declare this grant void merely because the general usage of the country is to place the road next to the levee."

From this opinion it would seem that, if there had been satisfactory proof before the court that the ground in controversy had been appropriated to public use, the decision, instead of being favorable to the grantee, would have been against him. There can be no difference in principle between ground dedicated as a quay to public use and the streets and alleys of a town; and as to the streets, it may be asked whether the king could rightfully have granted them. This will not be pretended by any one. And it is believed that the public right to a common is equally beyond the power of the sovereign to grant, unless he dispose of it under the power to appropriate property to the national use, and then compensation must be paid.

The grant to Liotaud was also contested by the city authorities, but it was decided against them on a ground which did not embrace the merits of the claim, on the part of the city, as now presented. In speaking of this case Mr. Justice Martin, in his able and learned opinion in the case of *De Armas and Cucullu v. The Mayor of New Orleans, etc.*, 5 La., 166, 167, says: "In Liotaud's case, the then plaintiffs labored under the inability to establish the appropriation to the public use, by the founder of the city of New Orleans, of the space which separates the first row of houses from the Mississippi.

"The appellants stated their ability to establish that, immediately after the grant, murmurs had been excited, and the inalienability of any part of the space having been tenaciously insisted on, the governor had revoked his grant and indemnified the grantee by the concession of the lot on one of the streets; but the court decided the testimony was inadmissible, and the witnesses were not heard." "Magnon," the same judge remarks, "was a ship-builder, and the ship-yard was between the levee and the water. The governor, deeming the builder's residence near it necessary to the public service, allotted him a space of ground to live on near the yard, but on the opposite side of the levee. The question arising out of this grant was not litigated, the city agreeing to compensate Magnon for the relinquishment of his claim." This lot, however, though a part of the ground alleged to have been dedicated to public use, is not within the common or quay contested in this case.

And it appears from the above opinion that, to prevent any other titles being made for any part of the common, certain proceedings were instituted by the attorney-general, at the instance of the city authorities, which prevented the emanation of any other grants for any part of the quay until the country was ceded to the United States.

From a careful examination of the jurisdiction exercised over this common by the governments of France and Spain, and the laws which regulated this description of property in both countries, the conclusion seems not to be authorized, that it was considered as a part of the public domain or crown lands, which the king could sell and convey. This power was not exercised by the king of France, and the exercise of the power by the Spanish governor in the instances stated was in violation of the laws of Spain, and equally against its usages. The land having been dedicated to public use was withdrawn from commerce, and so long as it continued to be thus used could not become the property of any individual. So careful was the king of Spain to guard against

the alienation of property which had been dedicated to public use, that in a law cited, all such conveyances are declared to be void.

§ 44. *An illegal grant by the sovereign of land dedicated to public use does not affect the right of the public.*

It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive and cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantee. A grant has been frequently issued by the United States for land which had been previously granted; and the second grant has been held to be inoperative. And a case recently decided by this court, where the government had granted land in the state of Ohio as land belonging to the United States, which was found to be within the Virginia reservation in that state, to satisfy certain military claims, it was held that the title did not pass under the grant. If, then, the common in question had been dedicated to public use so as to withdraw it from commerce and so vest the title in the public as to preserve it from alienation by the king, the grants issued for the lots stated cannot affect the right of the public, at least, beyond the limits of those grants. That both the kings of France and Spain could exercise a certain jurisdiction over this common, and other places similarly situated, has been stated; but this was a police regulation, and was rightfully exercised in such a manner as not to encroach upon the public use. This seems to be the result to which a careful examination of the laws and usages of both countries must lead us.

§ 45. *The rights of France and Spain over Louisiana vested in the United States.*

We come now to examine, under the third head, the interest of the United States in the property claimed by the city, and their jurisdiction over it. The first article of the treaty of cession is as follows: "Whereas, by the article the third of the treaty, concluded at St. Ildefonso, the 1st October, 1800, between the first consul of the French republic and his Catholic majesty, it was agreed as follows: His Catholic majesty promises and engages, on his part, to retrocede to the French republic, six months after the full and entire execution of the conditions and stipulations herein relative to his royal highness the duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and other states." And in behalf of the French republic, the first consul ceded "forever, and in full sovereignty, the said territory, with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French republic," etc.

And in the second article it is declared that in the cession "are included the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings," etc. Under this treaty Louisiana was ceded to the United States in full sovereignty, and in every respect with all its rights and appurtenances, as it was held by the republic of France, and as it was received by that republic from Spain. And it is insisted that the same rights of jurisdiction and property which appertained to the sovereign of Spain, under its laws and regulations, were, by the treaty, transferred to the United States; and that, whether this right extends to the fee of the property in contest, or the regulation of its use, it is contended that this court must take jurisdiction of the case, and restrain the city authorities from selling any part of it.

§ 46. *The federal government treating land dedicated to public use as part of the public domain.*

To show that the federal government has considered this common as a part of the public domain under the treaty, various laws of congress have been referred to, and official proceedings by the agents of the government in reference to it; and also it is shown that the action of the government has been solicited by the city authorities, who, by these acts, it is insisted, have acknowledged the right of property to be in the United States, as asserted in their behalf by the district attorney of Louisiana. We will refer more particularly to those acts. On the 26th March, 1804 (2 Stats. at Large, 283), congress passed an act "erecting Louisiana into two territories, and providing for the government thereof;" in the fourteenth section of which it was provided that all grants for land within the territories ceded by France, the title of which was, at the date of the treaty of St. Ildefonso, in the crown, etc., of Spain, were declared to be null and void." Provided, nothing in the section was to make void any *bona fide* grant, agreeably to the laws, usages, etc., of the Spanish government. An act entitled "An act for ascertaining and adjusting the titles and claims to land within the territory of Orleans and the district of Louisiana" was passed on the 2d March, 1805 (2 Stats. at Large, 324). This act, after specifying what titles under the Spanish government should be held valid, and requiring the evidences of title to be exhibited, etc., authorized the appointment of a register, who, with two commissioners to be appointed, were to constitute a board for the decision of land claims in the territory, etc.; and their report was required to be laid before congress, etc. And by an act of the 3d March, 1807 (2 Stats. at Large, 440), it was provided "that the claim of the city of New Orleans to the commons adjacent to said city, and within six hundred yards of the fortifications of the same, be, and the same is hereby, recognized and confirmed: provided, that the corporation shall, within six months after passing this act, relinquish and release any claim they may have to such commons beyond the distance of six hundred yards aforesaid," etc.

Other acts were passed in relation to land claims in the district which it cannot be necessary to notice. Arnaud Magnon, whose claim has been before referred to, applied to the commissioners under the above act to report on land titles, etc., who reported: "We know of no law or usage of the Spanish government respecting claims similarly situated; but think it highly probable, that had the claimant applied he would have obtained a grant for it, as a grant was made to a lot of ground adjoining him under no higher pretensions. Nor does this appear to come within any of the provisions of the laws of the United States, although there have been ten consecutive years' possession; the land has not been inhabited or cultivated. This part of the claim we do not feel ourselves authorized to decide on, but are of opinion that, in justice, the claim ought to be confirmed."

And on the claim of John J. Chessé the commissioners report that "they did not feel authorized to make any decision on the claim; but they thought it would be more an act of justice than generosity if the government should confirm it." A similar report was made on the claim of Catherine Gonzales and Peter Urtubise. Their claims were for lots of ground within the common, and they have been confirmed by acts of congress, and patents have been issued to the claimants.

The claim of the city to the commons was presented by P. Derbigny and L. S. Kerr, who were duly authorized to present it in behalf of the city. And

the commissioners reported "that the claim was in part settled by the acts of congress of 1807 and 1811 (2 Stats. at Large, 617), which confirm to the corporation six hundred yards from the fortifications of the city, but which are, nevertheless, embraced by the claim aforesaid. That they had in vain searched in the documents to which they were referred for proof of even a shadow of title to this land. That there was no evidence of it ever having been granted or considered as belonging to the city, either by the French or Spanish government. The board, therefore, rejected the claim."

On the 3d of April, 1812 (2 Stats. at Large, 700), congress "passed an act granting to the corporation of the city of New Orleans the use and possession of a lot in the said city." By this act the city "was authorized to use, possess and occupy the same for the purpose of erecting, or causing to be erected and kept in operation, a steam engine or engines for conveying water into the said city, and all buildings necessary to the said purpose; provided, that if the space of ground shall not be occupied for the said purpose within the term of three years from and after the passing of this act, or shall, at any time thereafter, cease to be so occupied for the term of three years, the right and claim of the United States thereto shall remain unimpaired." And by an act of the 30th of March, 1822 (3 Stats. at Large, 661), "the corporation of the city of New Orleans was authorized to appropriate so much of the lot of ground on which Fort St. Charles formerly stood as may be necessary for continuing Esplanade street to the Mississippi river; and, also, to sell and convey that portion of the said ground which lies below said street," etc.

By the act of the 20th of April, 1818 (4 Stats. at Large, 465), congress authorized the president to abandon the use of the navy arsenal, military hospital and barracks in the city of New Orleans, and, after laying off the ground into lots, to sell them at public sale, etc. And he was authorized to cause the Fort St. Charles to be demolished, and the navy yard in the city to be discontinued, and the lot of ground on which the fort stood was appropriated to the use of a public square, to be improved as the corporation of the city should think proper. These acts related to lots within the common of the city, though but few of them are included in that part of the ground respecting which this suit was commenced.

These official acts of the federal government, by legislation and otherwise, respecting the common claimed by the city, and some of which were induced by the special application of the corporation, afford strong evidence, it is contended, not only of the right of the United States to the property in question, but that such right was fully recognized by the corporation. It must be admitted that several of these acts are unequivocal in their character, and do show, as contended by the attorney-general, an admission, on the part of the city, not only that congress had a right to legislate on this subject, but also to dispose of certain parts of the common in fee. And these acts, if unexplained, do strengthen the argument against the claim set up by the city.

§ 47. *Neither corporations nor individuals are prejudiced by acts done in ignorance of their rights.*

It is a principle sanctioned as well by law as by the immutable principles of justice, that, where an individual acts in ignorance of his rights, he shall not be prejudiced by such acts. And this rule applies at least with as much force to the acts of corporate bodies as to those of individuals. We will, therefore, inquire, as we are bound to do, whether, under the circumstances of this case, the acts of the city can, justly, be considered as prejudicing the claim which

they assert. In the first place, the fact that when we obtained possession of Louisiana, the city of New Orleans was composed of citizens who, in their language, habits of thinking and acting, were almost as dissimilar from other parts of the United States as if they had inhabited a different continent, is of great importance; and, above all, they were unacquainted with the nature of our government, in a great degree, and the principles of our jurisprudence. They may be supposed to have been acquainted with the civil law, and to some extent, at least, with their rights as recognized and sanctioned by the laws and usages of Spain.

It is well known that the policy of Spain in regard to a disposition of her public domain is entirely different to that which has been adopted by the United States. We dispose of our public lands by sale; but Spain has uniformly bestowed her domain in reward for meritorious services, or to encourage some enterprise deemed of public utility. That a community composed, as were the citizens of New Orleans, almost entirely of foreigners, and under the circumstances which existed, should have mistaken their rights, is not extraordinary. Indeed, it would have been a matter of surprise if they had, under the new system, understood the extent of their claim. They did exhibit their claim to the commissioners, who rejected it. And this, no doubt, induced the corporation to make the applications to congress which have been noticed.

§ 48. *Authorities of a city have no power to divest it of its interest in a common.*

But in addition to the consideration that the city authorities probably acted in ignorance of their rights, it may be safely assumed that they had not the power, by the acts referred to, to divest the city of a vested interest in this common.

§ 49. *Neither the fee to the land in controversy nor the right to regulate its use is vested in the federal government.*

We come now to inquire whether any interest in the vacant space in contest passed to the United States under the treaty of cession. In the second article of the treaty, "all public lots and squares, vacant lands and all public buildings, fortifications, barracks and other edifices, which are not private property," were ceded. And it is contended, as the language of this article clearly includes the ground in controversy, whether it be considered a public square or vacant land, the entire right of the sovereign of Spain passed to the United States. The government of the United States, as was well observed in the argument, is one of limited powers. It can exercise authority over no subjects except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power.

If the common in contest, under the Spanish crown, formed a part of the public domain or the crown lands, and the king had power to alien it as other lands, there can be no doubt that it passed under the treaty to the United States, and they have a right to dispose of it the same as other public lands. But if the king of Spain held the land in trust, for the use of the city, or only possessed a limited jurisdiction over it, principally, if not exclusively, for police purposes, was this right passed to the United States under the treaty? That this common, having been dedicated to public use, was withdrawn from commerce, and from the power of the king rightfully to alien it, has already been shown; and, also, that he had a limited power over it for certain purposes. Can the federal government exercise this power? If it can, this court has the

power to interpose an injunction or interdict to the sale of any part of the common by the city, if they shall think that the facts authorize such an interposition.

It is insisted that the federal government may exercise this authority under the power to regulate commerce. It is very clear that, as the treaty cannot give this power to the federal government, we must look for it in the constitution; and that the same power must authorize a similar exercise of jurisdiction over every other quay in the United States. A statement of the case is a sufficient refutation of the argument.

§ 50. *Jurisdiction of the federal government over Louisiana.*

Special provision is made in the constitution for the cession of jurisdiction from the states over places where the federal government shall establish forts or other military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction.

§ 51. *Sovereignty and jurisdiction of the states.*

The state of Louisiana was admitted into the Union on the same footing as the original states. Her rights of sovereignty are the same, and by consequence no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground which is not common to the United States. It belongs to the local authority to enforce the trust and prevent what they shall deem a violation of it by the city authorities. All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people.

It is enough for this court, in deciding the matter before them, to say that, in their opinion, neither the fee of the land in controversy, nor the right to regulate the use, is vested in the federal government; and, consequently, that the decree of the district court must be reversed and the cause remanded with directions to dismiss the bill. As it is not necessary, we do not decide on the right of the corporation to sell any part of the common, or to appropriate it in any other manner than as originally designated.

CITY OF CINCINNATI v. WHITE'S LESSEE.

(6 Peters, 431-444. 1832.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—The ejectment in this case was brought by Edward White, who is also the defendant in error, to recover possession of a small lot of ground in the city of Cincinnati, lying in that part of the city usually denominated the Common. To a right understanding of the question upon which the opinion of the court rests, it will be sufficient to state generally that on the 15th of October, in the year 1788, John Cleves Symmes entered into a contract with the then board of treasury, under the direction of congress, for the purchase of a large tract of land, then a wilderness, including that where the city of Cincinnati now stands. Some negotiations relative to the payments for the land delayed the consummation of the contract for several years. But on the 30th of September, 1794, a patent was issued conveying to Symmes and his associates the land contracted for; and as Symmes was the only person named in the patent, the fee was, of course, vested in him.

Before the issuing of the patent, however, and, as the witnesses say, in the year 1788, Mathias Denman purchased of Symmes a part of the tract included

in the patent, and embracing the land whereon Cincinnati now stands. That in the same year Denman sold one-third of his purchase to Israel Ludlow, and one-third to Robert Patterson. These three persons, Denman, Ludlow and Patterson, being the equitable owners of the land (no legal title having been granted), proceeded, in January, 1789, to lay out the town. A plan was made and approved of by all the proprietors, and according to which the ground lying between Front street and the river, and so located as to include the premises in question, was set apart as a common, for the use and benefit of the town forever, reserving only the right of a ferry; and no lots were laid out on the land thus dedicated as a common.

The lessor of the plaintiff made title to the premises in question under Mathias Denman, and produced in evidence a copy, duly authenticated, of the location of the fraction 17 from the books of John C. Symmes to Mathias Denman, as follows: "1791, April 4, Captain Israel Ludlow, in behalf of Mr. Mathias Denman, of New Jersey, presents for entry and location a warrant for one fraction of a section, or one hundred and seven and eight-tenths of an acre of land, by virtue of which he locates the seventeenth fractional section in the fourth fractional township, east of the Great Miami river, in the first fractional range of townships on the Ohio river; number of the warrant 192." In March, 1795, Denman conveyed his interest, which was only an equitable interest, in the lands so located to Joel Williams; and on the 14th of February, 1800, John Cleves Symmes conveyed to Joel Williams in fee, certain lands described in the deed which included the premises in question; and on the 16th of April, 1800, Joel Williams conveyed to John Daily the lot now in question. And the lessor of the plaintiff, by sundry mesne conveyances, deduces a title to the premises to himself.

In the course of the trial several exceptions were taken to the ruling of the court, with respect to the evidence offered on the part of the plaintiff in making out his claim of title. But in the view which the court has taken of what may be considered the substantial merits of the case, it becomes unnecessary to notice those exceptions. The merits of the case will properly arise upon one of the instructions given by the court, as asked by the plaintiff, and in refusing to give one of the instructions asked on the part of the defendant. At the request of the plaintiff, the court instructed the jury "that, to enable the city to hold this ground and defend themselves in this action by possession, they must show an unequivocal, uninterrupted possession for at least twenty years."

On the part of the defendants, the court was asked to instruct the jury "that it was competent for the original proprietors of the town of Cincinnati to reserve and dedicate any part of said town to public uses, without granting the same by writing or deed to any particular person; by which reservation and dedication the whole estate of the said proprietors in said land, thus reserved and dedicated, became the property of, and was vested in, the public for the purposes intended by the said proprietors; and that, by such dedication and reservation, the said original proprietors, and all persons claiming under them, are estopped from asserting any claim or right to the said land thus reserved and dedicated." The court refused to give the instruction as asked, but gave the following instruction: "That it was competent for the original proprietors of the town of Cincinnati to reserve and dedicate any part of said town to public uses, without granting the same by writing or deed to any particular person; by which reservation and dedication the right of use to such part is

vested in the public for the purposes designated; but that such reservation and dedication do not invest the public with the fee."

The ruling of the court to be collected from these instructions was that, although there might be a parol reservation and dedication to the public of the use of lands, yet such reservation and dedication did not invest the public with the fee; and that a possession and enjoyment of the use for less than twenty years was not a defense in this action. The decision and direction of the circuit court upon those points come up on a writ of error to this court.

It is proper, in the first place, to observe that, although the land which is in dispute, and a part of which is the lot now in question, has been spoken of by the witnesses as having been set apart by the proprietors as a common, we are not to understand the term as used by them in its strict legal sense; as being a right or profit which one man may have in the lands of another; but in its popular sense, as a piece of ground left open for common and public use, for the convenience and accommodation of the inhabitants of the town.

§ 52. *In a dedication of lands no grantee need be designated or in esse. (a)*

Dedications of land for public purposes have frequently come under the consideration of this court; and the objections which have generally been raised against their validity have been the want of a grantee competent to take the title, applying to them the rule which prevails in private grants, that there must be a grantee as well as a grantor. But that is not the light in which this court has considered such dedications for public use. The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor, and secure to the public the benefit held out, and expected to be derived from and enjoyed by the dedication. It was admitted at the bar that dedications of land for charitable and religious purposes and for public highways were valid, without any grantee to whom the fee could be conveyed. Although such are the cases which most frequently occur and are to be found in the books, it is not perceived how any well-grounded distinction can be made between such cases and the present. The same necessity exists in the one case as in the other, for the purpose of effecting the object intended. The principle, if well founded in the law, must have a general application to all appropriations and dedications for public use, where there is no grantee *in esse* to take the fee. But this forms an exception to the rule applicable to private grants, and grows out of the necessity of the case. In this class of cases there may be instances, contrary to the general rule, where the fee may remain in abeyance until there is a grantee capable of taking, where the object and purpose of the appropriation look to a future grantee in whom the fee is to vest. But the validity of the dedication does not depend on this; it will preclude the party making the appropriation from re-asserting any right over the land, at all events so long as it remains in public use; although there may never arise any grantee capable of taking the fee.

The recent case of *Beatty v. Kurtz*, 2 Pet., 566, in this court, is somewhat analogous to the present. There a lot of ground had been marked out upon the original plan of an addition to Georgetown, "for the Lutheran church," and had been used as a place of burial from the time of the dedication. There was not, however, at the time of the appropriation, or at any time afterwards, any incorporated Lutheran church capable of taking the donation.

(a) *Beatty v. Kurtz*, 2 Pet., 566, and *Town of Pawlet v. Clark*, 9 Cr., 302, to the same effect.

The case turned upon the question, whether the title to the lot ever passed from Charles Beatty, so far as to amount to a perpetual appropriation of it to the use of the Lutheran church. That was a parol dedication only, and designated on the plan of the town. The principal objection relied upon was, that there was no grantee capable of taking the grant. But the court sustained the donation, on the ground that it was a dedication of the lot to public and pious uses, adopting the principle that had been laid down in the case of *The Town of Pawlet v. Clark*, 9 Cranch, 292 (CHURCHES, §§ 34-51), that appropriations of this description were exceptions to the general rule requiring a grantee. That it was like a dedication of a highway to the public. This last remark shows that the case did not turn upon the bill of rights of Maryland, or the statute of Elizabeth relating to charitable uses, but rested upon more general principles, as is evident from what fell from the court in the case of *The Town of Pawlet v. Clark*, which was a dedication to religious uses; yet the court said this was not a novel doctrine in the common law. In the familiar case where a man lays out a street or public highway over his land, there is, strictly speaking, no grantee of the easement, but it takes effect by way of grant or dedication to public uses. And in support of the principle, the case of *Lade v. Shepherd*, 2 Stra., 1004, was referred to, which was an action of trespass, and the place where the supposed trespass was committed was formerly the property of the plaintiff, who had laid out a street upon it, which had continued thereafter to be used as a public highway; and it was insisted, on the part of the defendant, that by the plaintiff's making a street, it was a dedication of it to the public, and that although he, the defendant, might be liable for a nuisance, the plaintiff could not sue him for a trespass. But the court said, it is certainly a dedication to the public, so far as the public has occasion for it, which is only for a right of passage, but it never was understood to be a transfer of his absolute property in the soil.

§ 53. *A dedication need not be in writing; nor need the fee pass.*

The doctrine necessarily growing out of that case has a strong bearing upon the one now before the court, in two points of view. It shows, in the first place, that no deed or writing was necessary to constitute a valid dedication of the easement. All that was done, from anything that appears in the case, was barely laying out the street by the owner, across his land. And, in the second place, that it is not necessary that the fee of the land should pass, in order to secure the easement to the public. And this must necessarily be so, from the nature of the case, in the dedication of all public highways. There is no grantee to take immediately, nor is any one contemplated by the party to take the fee at any future day. No grant or conveyance can be necessary to pass the fee out of the owner of the land, and let it remain in abeyance until a grantee shall come *in esse*; and indeed the case referred to in *Strange* considers the fee as remaining in the original owner; otherwise he could sustain no action for a private injury to the soil, he having transferred to the public the actual possession.

If this is the doctrine of the law applicable to highways, it must apply with equal force, and in all its parts, to all dedications of land to public uses; and it was so applied by this court to the reservation of a public spring of water for public use, in the case of *McConnell v. The Trustees of the Town of Lexington*, 12 Wheat., 582. The court said, the reasonableness of reserving a public spring for public use, the concurrent opinion of all the settlers that it was so reserved, the universal admission of all that it was never understood

that the spring lot was drawn by any person, and the early appropriation of it to public purposes, were decisive against the claim. The right of the public to the use of the common in Cincinnati must rest on the same principles as the right to the use of the streets; and no one will contend that the original owners, after having laid out streets, and sold building lots thereon, and improvements made, could claim the easement thus dedicated to the public.

All public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged right over the use of the land, in order to carry into effect the purposes intended, than may be necessary in an appropriation for a highway in the country; but the principle, so far as respects the right of the original owner to disturb the use, must rest on the same ground in both cases; and applies equally to the dedication of the common as to the streets. It was for the public use and convenience and accommodation of the inhabitants of Cincinnati; and doubtless greatly enhanced the value of the private property adjoining this common, and thereby compensated the owners for the land thus thrown out as public grounds.

§ 54. *A dedication is irrevocable if acted upon.*

And after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication. It is a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted.

§ 55. *When a dedication will be presumed from possession and use.*

The right of the public in such cases does not depend upon a twenty years' possession. Such a doctrine, applied to public highways and the streets of the numerous villages and cities that are so rapidly springing up in every part of our country, would be destructive of public convenience and private right. The case of *Jarvis v. Dean*, 3 Bing., 447, shows that rights of this description do not rest upon length of possession. The plaintiff's right to recover in that case turned upon the question whether a certain street in the parish of Islington had been dedicated to the public as a common public highway. Chief Justice Best, upon the trial, told the jury that if they thought the street had been used for years as a public thoroughfare, with the assent of the owner of the soil, they might presume a dedication; and the jury found a verdict for the plaintiff, and the court refused to grant a new trial, but sanctioned the direction given to the jury, and the verdict found thereupon, although this street had been used as a public road only four or five years, the court saying the jury were warranted in presuming it was used with the full assent of the owner of the soil. The point, therefore, upon which the establishment of the public street rested was, whether it had been used by the public as such, with the assent of the owner of the soil; not whether such use had been for a length of time which would give the right by force of the possession; nor whether a grant might be presumed; but whether it had been used with the assent of the owner of the land; necessarily implying that the mere naked fee of the land remained in the owner of the soil, but that it became a public street by his permission to have it used as such. Such use, however, ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.

In the present case the fact of dedication to public use is not left to in-

ference from the circumstance that the land has been enjoyed as a common for many years. But the actual appropriation for that purpose is established by the most positive and conclusive evidence. And, indeed, the testimony is such as would have warranted the jury in presuming a grant, if that had been necessary. And the fee might be considered in abeyance, until a competent grantee appeared to receive it, which was as early as the year 1802, when the city was incorporated. And the common having then been taken under the charge and direction of the trustees, would be amply sufficient to show an acceptance if that was necessary for securing the protection of the public right.

But it has been argued that this appropriation was a nullity, because the proprietors, Denman, Ludlow and Patterson, when they laid out the town of Cincinnati, and appropriated this ground as a common, in the year 1789, had no title to the land, as the patent to Symmes was not issued until the year 1794. It is undoubtedly true that no legal title had passed from the United States to Symmes. But the proprietors had purchased of Symmes all his equitable right to their part of the tract which he had under his contract with the government. This objection is more specious than solid, and does not draw after it the conclusions alleged at the bar.

§ 56. *No formalities required in a dedication to public use.*

There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land and the fact of its being used for the public purposes intended by the appropriation. This was the doctrine in the case of *Jarvis v. Dean*, 3 Bing., 447, already referred to, with respect to a street; and the same rule must apply to all public dedications; and from the mere use of the land, as public land, thus appropriated, the assent of the owner may be presumed. In the present case, there having been an actual dedication fully proved, a continued assent will be presumed, until a dissent is shown, and this should be satisfactorily established by the party claiming against the dedication. In the case of *Rex v. Lloyd*, 1 Camp., 262, Lord Ellenborough says, if the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public.

§ 57. *Dedication by equitable owner.*

At the time the plan of the town of Cincinnati was laid out by the proprietors, and the common dedicated to public use, no legal title had been granted. But as soon as Symmes became vested with the legal title, under the patent of 1794, the equitable right of the proprietors attached upon the legal estate, and Symmes became their trustee, having no interest in the land but the mere naked fee. And the assent of the proprietors to the dedication continuing, it has the same effect and operation as if it had originally been made after the patent issued. It may be considered a subsequent ratification and affirmance of the first appropriation. And it is very satisfactorily proved that Joel Williams, from whom the lessor of the plaintiff deduces his title, well understood, when he purchased of Denman, and for some years before, that this ground had been dedicated as a public common by the proprietors. The original plat, exhibiting this ground as a common, was delivered to him at the time of the purchase. And when he afterwards, in the year 1800, took a deed from Symmes, he must, according to the evidence in the case, have known that he was a mere trustee, holding only the naked fee. And from the notoriety of the fact that these

grounds were laid open and used as a common, it is fairly to be presumed that all subsequent purchasers had full knowledge of the fact.

§ 58. *Ejectment is a possessory remedy.*

But it is contended that the lessor of the plaintiff has shown the legal title to the premises in question in himself, which is enough to entitle him to recover at law; and that the defendants' remedy, if any they have, is in a court of equity. And such was substantially the opinion of the circuit court in the fourth instruction asked by the plaintiff, and given by the court, namely, "that if the said proprietors did appropriate said ground, having no title thereto, and afterwards acquired an equitable title only, that equitable title could not inure so as to vest a legal title in the city or citizens, and enable them to defend themselves in an action of ejectment brought against them by a person holding the legal title."

We do not accede to this doctrine. For should it be admitted that the mere naked fee was in the lessor of the plaintiff, it by no means follows that he is entitled to recover possession of the common in an action of ejectment. This is a possessory action, and the plaintiff, to entitle himself to recover, must have the right of possession; and whatever takes away this right of possession will deprive him of the remedy by ejectment. *Adams' Eject.*, 32; *Starkie*, part 4, 506, 507.

This is the rule laid down by Lord Mansfield in *Atkins v. Horde*, 1 Burr., 119. An ejectment, says he, is a possessory remedy, and only competent where the lessor of the plaintiff may enter; and every plaintiff in ejectment must show a right of possession as well as of property. And in the case of *Doe v. Staple*, 2 Durn. & E., 684, it was held that, although an outstanding satisfied term may be presumed to be surrendered, yet an unsatisfied term, raised for the purpose of securing an annuity, cannot, during the life of the annuitant; and may be set up as a bar to the heir at law, even though he claim only subject to the charge. Thereby clearly showing the plaintiff must have, not only the legal title, but a clear present right to the possession of the premises, or he cannot recover in an action of ejectment. And in the case of *Doe v. Jackson*, 2 Dowl. & Ry., 523, Bailey, justice, says, "an action of ejectment, which from first to last is a fictitious remedy, is founded on the principle that the tenant in possession is a wrong-doer; and unless he is so at the time the action is brought, the plaintiff cannot recover."

If, then, it is indispensable that the lessor of the plaintiff should show a right of possession in himself, and that the defendants are wrong-doers, it is difficult to perceive on what grounds this action can be sustained. The later authorities in England which have been referred to leave it at least questionable whether the doctrine of Lord Mansfield in the case of *Goodtitle v. Alker*, 1 Burr., 143, "that ejectment will lie by the owner of the soil for land which is subject to a passage over it as the king's highway," would be sustained at the present day at Westminster Hall. It was not even at that day considered a settled point, for the counsel on the argument (page 140) referred to a case, said to have been decided by Lord Hardwicke, in which he held that no possession could be delivered of the soil of a highway, and therefore no ejectment would lie for it.

This doctrine of Lord Mansfield has crept into most of our elementary treatises on the action of ejectment, and has apparently, in some instances, been incidentally sanctioned by judges. But we are not aware of its having been adopted in any other case where it was the direct point in judgment. No such

case was referred to on the argument, and none has fallen under our notice. There are, however, several cases in the supreme court of errors of Connecticut, where the contrary doctrine has been asserted and sustained by reasons much more satisfactory than those upon which the case in *Burrow* is made to rest. *Stiles v. Curtis*, 4 Day, 328; *Peck v. Smith*, 1 Conn., 103. But if we look at the action of ejectment on principle, and inquire what is its object, it cannot be sustained on any rational ground. It is to recover possession of the land in question, and the judgment, if carried into execution, must be followed by delivery of possession to the lessor of the plaintiff.

The purpose for which the action is brought is not to try the mere abstract right to the soil, but to obtain actual possession; the very thing to which the plaintiff can have no exclusive or private right. This would be utterly inconsistent with the admitted public right. That right consists in the uninterrupted enjoyment of the possession. The two rights are therefore incompatible with each other, and cannot stand together. The lessor of the plaintiff seeks specific relief, and to be put into the actual possession of the land. The very fruit of his action, therefore, if he avails himself of it, will subject him to an indictment for a nuisance; the private right of possession being in direct hostility with the easement or use to which the public are entitled; and as to the plaintiff's taking possession subject to the easement, it is utterly impracticable. It is well said by Mr. Justice Smith, in the case of *Stiles v. Curtis*, 4 Day, 328, that the execution of a judgment in such case involves as great an inconsistency as to issue an *habere facias possessionem* of certain premises to A., subject to the possession of B. It is said cases may exist where this action ought to be sustained for the public benefit, as where erections are placed on the highway obstructing the public use. But what benefit would result from this to the public? It would not remove the nuisance. The effect of a recovery would only be to substitute another offender against the public right, but would not abate the nuisance. That must be done by another proceeding.

§ 59. *Ejectment is not a concurrent remedy with trespass and case.*

It is said in the case in *Burrow* that an ejectment could be maintained because trespass would lie. But this certainly does not follow. The object and effect of the recoveries are entirely different. The one is to obtain possession of the land, which is inconsistent with the enjoyment of the public right, and the other is to recover damages merely, and not to interfere with the possession, which is in perfect harmony with the public right. So, also, if the fee is supposed to remain in the original owner, cases may arise where, perhaps, waste or a special action on the case may be sustained for a private injury to such owner. But these are actions perfectly consistent with the public right. But a recovery in an action of ejectment, if carried into execution, is directly repugnant to the public right.

Upon the whole, the opinion of the court is that the judgment must be reversed, and the cause sent back with directions to issue a *venire de novo*.

BARCLAY v. HOWELL'S LESSEE.

(6 Peters, 498-514. 1832.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This suit was brought in the western district of Pennsylvania to recover a lot of ground in the city of Pittsburgh, described in the declaration as lying between Water street and the river Monongahela.

As the district judge could not sit in the cause, it was certified to the eastern district, under the act of congress. The defendants in the court below appeared in behalf of the city and defended the action, on the ground that the entire slip of land between the north line of Water street and the river was dedicated, at the time the town was laid out, as a street or right of way to the public.

The lessor of the plaintiff exhibited legal conveyances for the lot in controversy. At the trial, various exceptions were taken to the ruling of the court, in the rejection of evidence offered by the defendants, and also to the charge of the court to the jury. These exceptions are brought before this court for consideration by a writ of error.

§ 60. *Sufficient description of premises in ejectment.*

The first assignment of error is, in substance, that the verdict, being general, is void for want of certainty. That the finding of the jury did not settle the matter in controversy, and, by consequence, did not authorize the judgment. This must be considered as an exception to the sufficiency of the declaration; as any other matter embraced by it might have been considered on a motion for a new trial, but cannot now be noticed. The description of the lot in the declaration is general, as lying between Water street and the river; but no doubt is entertained that this is a sufficient description. Formerly, it was necessary to describe the premises for which an action of ejectment was brought with great accuracy; but far less certainty is requisite in modern practice. All the authorities say that a general description is good. The lessor of the plaintiff, on a lease for a specific number of acres, may recover any quantity of less amount.

The rejection of the evidence contained in the depositions of Samuel Ewalt and John Finley is the second error assigned. To understand the force of this exception, it will be necessary to advert to a succinct history of the case. There was vested in the Penn family a tract of land consisting of between five and six thousand acres that included the village of Pittsburgh, which at that time consisted of a small number of settlers, very few, if any of whom, had a title to the lots they occupied. This tract was denominated a manor, as was the practice at that time to call large tracts of land which had been surveyed within the charter of the original proprietor of Pennsylvania. Being desirous of laying out a town at Pittsburgh, Trench Francis, who acted as the attorney of John Penn, Jr., and John Penn, addressed the following letter to George Woods, Esq.:

“PHILADELPHIA, 22d April, 1784.

“SIR: By directions of Messrs. Penns, I take the liberty to request you to undertake the laying out of the town of Pittsburgh, and dividing all the other parts of the manor into proper lots and farms, and to set a value on each, supposing them clear of any kind of incumbrances, in doing of which be pleased to make the proper inquiries, and ascertain the previous claims, pretended or not, of the present settlers, and all others set up. The whole of the manor being intended for immediate sale, I wish you would point out the best method to effect it; and, if agreeable to you to transact this business, inform me on what terms you will do it. All expenses, and your charges for making the above survey, I will pay,” etc.

In the month of May or June, of the same year, Woods laid out the town of Pittsburgh, and also surveyed, into out lots and small plantations, the residue of the manor; and made return to his principal of a copy of the town

plat and the other surveys. This return, and the whole proceedings of Woods, were sanctioned by the following letter:

“PHILADELPHIA, 30th September, 1784.

“DEAR SIR: As attorney to John Penn, Jr., and John Penn, Esqs., late proprietors of Pennsylvania, I hereby approve of the plan you have made of the town of Pittsburgh, and now confirm the same, together with the division of the out lots and the other part of the manor of Pittsburgh. The several appliers, agreeable to your list furnished me, may depend on having deeds for their lots and plantations, whenever they pay the whole of the purchase money, etc.

“GEORGE WOODS, Esq.

TENCH FRANCIS.”

The original plat of the town of Pittsburgh, which was made by Woods, was given in evidence to the jury, from which it appears that the town was laid out into lots, streets and alleys, from the junction of the Alleghany and Monongahela rivers, extending up the latter to Grant street. With the exception of Water street, which lies along the bank of the Monongahela, all the streets and alleys of the town were distinctly marked by the surveyor, and their width laid down. Near the junction of the rivers, the space between the southern line of the lots and Monongahela river is narrow, but it widens as the lots extend up the river.

It was contended by the defendants in the ejectment that the before described slip of land was dedicated by the surveyor, when he laid out the town, to the public as a street, or for other public uses. As the lot for which the ejectment was brought is situated in this narrow strip of land, the fact of dedication becomes material. From the plan of the town, it does not appear that any artificial boundary, as the southern limit of Water street, was laid down. The name of the street is given, and its northern boundary; but the space to the south is left open to the river. All the streets leading south terminate at Water street; and no indication is given in the plat, or in any part of the return of the surveyor, that Water street did not extend to the river, as it appears to do by the face of the plat.

The depositions of Ewalt and Finley were offered by the defendants, to prove the declarations of Woods at the time the survey of the town was made. Ewalt stated that the survey was about to be commenced at a point which would have required him to remove his house, and that at his instance the place of beginning was changed. On a remonstrance being made by several persons who had assembled, that Water street would be too narrow, Mr. Woods observed to the party, “these houses will not remain or stand very long; you will build new houses and dig cellars, and bank out Water street as wide, till it comes to low-water mark, if you please.” He observed, “that this street, to low-water mark, should be for the use of the citizens and the public forever.”

§ 61. *When the declarations of an agent are admissible on a question of dedication.*

Finley states that Woods declared to the people of the town that he would not change the old military plan; but that “Water street should be left open to the river’s edge, at low-water mark, for the use of said town; that they, the citizens, might use the same as landings, build walls, make wharves, or plant trees, at their pleasure.” Several objections are made to the competency of this testimony. It is insisted that the declarations of Woods respecting the ground in controversy did not come within the scope of his authority; and, if

they did, still that they ought not to be received in evidence. Woods had authority to fix upon the plan of the town and survey it. He had the power to determine the width of the respective streets and alleys, the size and form of the lots, to mark out the public grounds, and to determine on everything, so far as related to the town, which would add to its beauty, convenience and value. These were clearly within the scope of his powers, as they were essentially connected with the plan of the town, on which he was authorized to determine at his discretion.

§ 62. — *ratification by principal relates back.*

But it is said that his acts, until sanctioned, were not binding upon his principal; and that, as his principal was not present, his sanction, which was subsequently given, cannot be extended beyond what appears upon the town plat which was returned by the agent. The sanction, when given, related back to the original transaction, and gave equal effect to it as if the principal had been present. So far as valuations had been made of the lots occupied by persons who had no titles, and who were to obtain titles on paying the prices fixed by Woods, it is very clear that the principal could not be bound by the act of confirmation beyond what appeared upon the face of the return; nor, if the agent had attempted, by any covert means, to give to the citizens of the town ground which he did not designate on his return, and which did not tend, directly, to increase the value of the town lots. But if the ground dedicated for a street, or any other public use, was essentially connected with the town lots, and must have enhanced their value at the sale, the increased value thus realized, and a long acquiescence, would estop the original owner of the fee from asserting his claim, though the ground dedicated had not been so designated on the map.

There is nothing, however, on the plat which shows any limits to the width of Water street, short of the river on the south. If a line had been drawn along its southern limit, there would have been great force in the argument that the ground between such limit and the water was reserved by the proprietors. This would have been the legal consequence from such a survey, unless the contrary had been shown. It must be admitted that the declarations of an agent respecting things done within the scope of his authority are not evidence to charge his principal, unless they were made at the time the act was done, and formed a part of the transaction. The declarations referred to were a part of the *res gesta*; they were explanatory of the act then being done; and they do not, as was contended, contradict the return, but tend to explain and confirm it. The southern limit of Water street was the point of inquiry before the jury. It was a question of boundary, and governed by the same rules of evidence which are of daily application in such a case. In this view, were not the declarations of the person who fixed the boundary legal evidence? Not declarations casually made at a different time from that at which the survey was executed, but at the very time the act was done. The proof of such declarations should have been admitted by the circuit court; because, under the circumstances, they formed a part of the transaction.

§ 63. *Declarations of surveyor inadmissible, when.*

The declarations of a surveyor which contradict his official return are clearly not evidence; nor ought they to be received where he has no power to exercise a discretion as explanatory of his return, while he is still living and may be examined as a witness.

The exception taken to the rejection of Coates' deposition is abandoned.

§ 64. *User and non-user as evidence of a dedication.*

Several exceptions were made to the charge of the court to the jury. 1. "In saying that the property in question passed to Wilson, unless the jury should decide that the whole ground to the river was not only dedicated as a street, but that it must be capable of being used as such; that it was used as a highway or street, and that the slip of land, if it was not wholly given to the public as a street, or so much of it as was not so given, vested in the proprietors as the undisputed owners of it."

As the fee to this property was vested in the Penn family at the time the town was laid out, it is a clear proposition that such parts of the land as were not conveyed to the purchasers or dedicated to the public remained in the proprietors. But that part of the charge which instructed the jury that it must appear that the ground to the river was not only capable of being used as a street, but had been so used, is conceived to be erroneous. From the evidence in the cause, it appears that the northern bank of the Monongahela, from its junction with the Alleghany to the extent of the town plat, still remains elevated in many places; but several of the streets leading south have been extended to the river, and they have been so graduated as to admit of an easy approach to the water.

When complaint was made to Woods that Water street would be too narrow, he observed that its width might be artificially extended for the convenience of the citizens to the river. From this it appears that the ground was not then in a condition to be used as a street; and that much labor was required to place it in that situation. But, if it were dedicated for that purpose, at the time the survey of the town was made, is it essential that it shall have been used as such within a limited time? This would hardly be pretended, as it regards other streets in the town. Suppose Market street or Wood street, leading north and south, had not been improved by the city of Pittsburgh until this time, could the original proprietors claim it as their property? If the dedication of these streets to the public were a matter of doubt, and a jury were about to inquire into the fact, it is admitted that their not having been improved or used as streets would be a circumstance which the jury might weigh against the proof of dedication. But it would most clearly be error for the court to instruct the jury that unless the ground claimed for these streets was in a situation to be used as streets, and had been so used, there could have been no dedication. This appears to have been the purport of the instruction to the jury, in regard to Water street. The words used were, that the jury must be "satisfied, not merely that the open space was used by the inhabitants of Pittsburgh or others, but that it was used as a highway or street; and that, in weighing the evidence on this point, they would naturally inquire whether, from the nature of the ground, it was capable of being so used."

From this instruction the jury were required to find against the right asserted in behalf of the city, unless the ground referred to had been used as a street or highway. This substituted the use for the right; and made the latter to depend upon the former. The right was not necessarily connected with the use within a limited period; as no such condition appears to have been imposed at the time it was granted. Whilst the circuit court might have called the attention of the jury to the fact that the ground in controversy never having been used as a street was a circumstance which they ought to weigh against the dedication contended for, it was error in them to say, in substance,

there could be no right without the use. This withdrew from the jury the main point of inquiry, by substituting another; the existence or non-existence of which was not inconsistent with the principal fact. It was not essential for the city to show that the entire slip of land referred to had been used as a street, but it was essential to establish that it had been dedicated as such.

§ 65. *Land diverted from the use to which it was dedicated does not revert to the original owner.*

The second objection to the charge is that the court instructed "the jury that no title in the corporation had been shown to a single foot of ground within the city; and that the acts of ownership exercised by the corporation were altogether inconsistent with the right asserted in behalf of the public; and plainly conveying to the jury the opinion that the improper or peculiar use made of the ground in question by the corporation gave the plaintiff a right to recover. The inference drawn in the conclusion of this assignment of error may not be fully sustained by the language of the court; but they did instruct the jury that the acts of 'ownership exercised by the corporation, in the way which had been stated, were altogether inconsistent with the right asserted in behalf of the public; since, if the whole of this ground, to low-water mark on the river, had been dedicated for a street, it was vested as such in the public, subject to be regulated and preserved by the corporation, and could not legally be treated and used as private property by that body.'"

The court here refer to certain wharves which have been constructed by the city along the Monongahela, and on the ground claimed to be Water street. Connected with these wharves is a graduated pavement, so as to render access to them from the city easy, and a tax is imposed on steamboats and other vessels for the use of them. If this ground had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a court of chancery to compel a specific execution of the trust, by restraining the corporation, or by causing the removal of obstructions. But even in such a case, the property dedicated would not revert to the original owner. The use would still remain in the public, limited only by the conditions imposed in the grant.

It does not appear, however, that the construction of wharves on the river and the pavement of the ground have, in the least degree, obstructed its use as a street. The pavement has undoubtedly promoted the public convenience; and if the whole line of the street were graduated and paved to the water as a public way, it would be much more valuable than in its present condition. The wharves cause no obstructions to the use of this ground as a street; and whether the city authorities have transcended their power in raising a revenue from them by the improvements which have been made is a question not necessarily involved in the case. If that part of this ground which is connected with the water has been appropriated to other uses than as a right of way, they are not inconsistent with such right; but if such had been the case, on that ground the jury could not have rendered a verdict against the city. Such uses might have tended to show that the dedication of this ground for a street, as contended for, had not been made; but no other or greater effect should have been given to them, had they been fully established, and their inconsistency with the right asserted clearly made out.

The third objection taken to the charge is that the court instructed "the jury that the deeds of Ormsby, and to Craig and Bayard, were inconsistent with a dedication of a space south of the Water street lots to the river, and

that these deeds conveyed the ground to the river, subject to the easement over a part of it." The deed of Ormsby to Gregg and Sidney bears date the 5th day of November, in the year of our Lord 1798, and was for "a certain lot of ground, situate in the town of Pittsburgh aforesaid, marked in the plan of said town number 183, bounded by Front street, the river Monongahela, and lots numbered 182 and 184, it being the same lot or piece of ground which the Honorable John Penn and John Penn, Jr., late proprietors of Pennsylvania, by their indenture bearing date the 2d day of October, 1784, did grant and convey unto the said Ormsby."

The deed to Craig and Bayard from the Penns bears date the 31st day of December, 1784, and conveyed to the grantees "and their heirs and assigns thirty-two lots or pieces of ground situate in a point formed by the junction of the two rivers, Monongahela and Alleghany, in the town of Pittsburgh, marked in the general plan of said town made by Colonel Woods, numbers 1, etc.; which said plan is recorded, or intended to be recorded, in the office for the recording of deeds for the county of Westmoreland." The said lots are bounded northwardly by the said Alleghany river, eastwardly by Morberry or Mulberry street, southwardly by Penn street, and southwestwardly by the Monongahela river.

The agreement under which this deed is executed is dated on the 22d day of January, 1784, which was about six months before the town was surveyed. By this agreement the Penns sold to Craig and Bayard "a certain tract of land in their manor of Pittsburgh, lying and being in a point formed by the junction of the rivers Monongahela and Alleghany, bounded on two sides by the rivers aforesaid," etc.

As this last deed covers ground which had been sold before the town was laid out, it is not perceived how it could be considered as inconsistent with the dedication contended for. It is true the deed was not executed until after the town plat was formed, but it was executed by force of a purchase made prior to the survey of the town, and the purchaser had a right to insist on the boundaries designated in the agreement. If the present contest were limited to the ground embraced in this agreement and included in the general description of the deed, it might become a serious question whether the description in the deed of the lots by their numbers as designated on Woods' plan of the town would not control that part of the description which refers to the Monongahela river. But, if it were admitted that this deed conveyed the land to the river, it could, under the circumstances, have no other effect than to restrict the dedication of the ground for a street to the extent of the deed. The deed from Ormsby called for the lot by its number, as marked on the plan of the town, and bounded by Front street, the river Monongahela, and lots numbered 182 and 184. The construction given to these calls was that the ground to the river was conveyed subject to the easement over a part of it. And this deed, the jury was instructed, was inconsistent with the dedication of the ground to the water as a street.

§ 66. *The legal effect of an instrument is for the court, but the question of boundaries of land is for the jury.*

It is contended, on the part of the defendant in error, that the charge given to the jury on this point was the legal construction of the deed, and consequently was a matter for the court to determine. The right of the court to decide on the legal effect of written instruments cannot be controverted; but the question of boundary is always a matter of fact for the determination of

the jury. It is the province of a court to instruct the jury that they should fix the boundaries of the tract in controversy by an examination of the whole evidence, and that artificial or natural boundaries called for control a call for course and distance. But it would withdraw the facts from the jury if the court were to fix the boundaries called for, and then determine on the legal effect of the instrument.

Suppose the controversy had been between the city of Pittsburgh and the persons claiming under Ormsby, who asserted a right to the ground, under his deed, to the river. The city in such a case would have contended, before the jury, that, taking the calls of the deed together, they would limit the conveyance to the lot designated on the plan of the town; and would not this have been a question for the jury to determine under the instruction of the court? an instruction which should lay down the general principles of law in such a case, and the legal effect that would result from a certain state of facts, but which should not take from the jury the right of determining on the limits of the lot from the calls in the deed. These calls are established by evidence extrinsic of the deed. They are matters of fact for the investigation of the jury. In principle there is no difference between the case under consideration and questions of boundary which are of daily occurrence. It is as much the province of a jury to determine the limits of a lot in a city or town, as the limits of any tract of land, however large or small. And if the court, in a question of boundary, may fix the limits of the grant, and then say what the legal effect of it shall be, there is nothing left for the action of the jury.

§ 67. *Inconsistent calls in a deed.*

The deed from Ormsby called for a lot designated on the town plat 183, bounded by Front street, the river Monongahela, and lots numbered 182 and 184. The plat of the town, which is referred to as containing a designation of the boundaries of the lot, fixes those boundaries as satisfactorily as any natural objects could fix them. Front street is called for, which lies parallel with Water street, as the northern boundary of the lot; and the adjoining lots lying east and west of it are named as the eastern and western boundaries. From this description can any one doubt the intention of the grantor, and the understanding of the grantee? Does lot 183, as marked on the plan of the town, extend to the river? This will not be pretended; nor that lots 182 and 184 extend to the river. The call for the river then, in the deed in question, is inconsistent with the other calls in the deed. By the town plat the southern boundary of the lot is limited by Water street, and by a call for this boundary it is as fixed and certain as the call for the river. The same may be said of the eastern and western boundary of the lot. Shall these calls be all disregarded or controlled by the single call for the natural boundary?

In a late case this court decided that a call in a patent for a different county from that in which the land was situated might be controlled by other calls in the patent. Such was the charge given to the jury in the court below, and it was sustained by this court.

The circuit court, therefore, instead of saying to the jury that the calls in this deed, and the one to Craig and Bayard, were inconsistent with the dedication of the ground referred to, should have instructed them that the different calls ought to be taken together; and that the calls for the river might be controlled by the other calls in the deeds, if the jury should be satisfied that such call had been inserted through inadvertence or mistake.

The fourth and last exception taken to the charge of the court is, that they

erred in instructing the jury "that if a street or streets leading to the Monongahela river were necessary to the enjoyment, by the inhabitants, of their property in the town, derived from persons under whom the plaintiff claimed, they are entitled to have them laid off over the land in dispute, of right, and not of favor; and that the law points out a mode by which this right may be enforced." This instruction does not involve a point which was material in the case; and though it were erroneous, it might not afford ground for the reversal of the judgment of the circuit court. Whether this right existed or not, it is not conceived how it could have had any influence with the jury.

The court seem to refer to the law of Pennsylvania regulating the opening of public roads. But the establishment of a public road cannot be claimed as a matter of right. An application must be made in the first instance by petition to the court of quarter sessions; a view of the proposed road is directed, and its establishment depends upon the report of the viewers and other necessary sanctions. This law, however, it is insisted, could have no operation in the city of Pittsburgh; that its streets and alleys are opened and regulated under the corporate authorities, and not by the provisions of the road law.

It is not deemed necessary, in deciding the points raised in this case, to notice all the questions discussed by the counsel in their arguments at the bar. Whether Water street extended to low or high water mark can be of no importance in the present controversy. If its southern boundary be limited by high water mark, it is clear that the proprietors parted with all their right. It is admitted by both parties, that the river Monongahela, being a navigable stream, belongs to the public; and a free use of it may be rightfully claimed by the public, whatever may be the extent of its volume of water. If Water street be bounded by the river on the south, it is only limited by the public right. To contend that between this boundary and the public right, a private and hostile right could exist, would not only be unreasonable, but against law. Tench Francis, the attorney in fact for the Penn family, and the agent who succeeded him, must be considered, for some purposes, as the principal in these transactions. His principals were in Europe; and to his discretion and superintendence they, of necessity, consigned the management of their property in this country. The long acquiescence, therefore, in the plan of the town, as returned by Woods, affords a strong presumption against the right asserted by the plaintiff below in this action.

§ 68. *When a grant to public uses of the whole of a tract of land may be presumed from the use of a part.*

The town was laid out in the spring or summer of 1784; no act was done by the proprietors showing any claim to the land in controversy until September, 1814, when the deed to Wilson was executed. Here is a lapse of about thirty years, within which no right is asserted by the Penn family hostile to that which was exercised by the city, in the use of this ground, to the extent which its means enabled it to improve, and the public convenience seemed to require. A title which has remained dormant for so great a number of years, and while the property was used for public purposes, and necessarily within the knowledge of the agents of the proprietors, is now asserted under doubtful circumstances of right. In some cases a dedication of property to public use, as for instance a street or public road, where the public has enjoyed the unmolested use of it for six or seven years, has been deemed sufficient evidence of dedication. This lapse of time, connected with the public use and the determination expressed by the agent at the time the town was

laid out to dispose of the whole of the manor, affords strong grounds to presume that no reservation of any part of the manor was intended to be made; and that the slip of land in controversy was not reserved. These were facts proper for the consideration of the jury in determining the fact of dedication. They were calculated to have a strong influence to rebut the presumptions relied on by the plaintiff in the court below. If it were necessary, an unmo- lested possession for thirty years would authorize the presumption of a grant. Indeed, under peculiar circumstances, a grant has been presumed from a pos- session less than the number of years required to bar the action of ejectment by the statute of limitations.

§ 69. *Quære: Whether the proprietor of a town retains the fee in the streets.*

By the common law the fee in the soil remains in the original owner, where a public road is established over it; but the use of the road is in the public. The owner parts with this use only, for if the road shall be vacated by the public, he resumes the exclusive possession of the ground; and while it is used as a highway, he is entitled to the timber and grass which may grow upon the surface, and to all minerals which may be found below it. He may bring an action of trespass against any one who obstructs the road. In the discussion of this case, the same doctrine has been applied by the counsel for the defend- ant in error to the streets and alleys of a town; but in deciding the points raised by the bill of exceptions, it is not necessary to determine this question.

Where the proprietor of a town disposes of all his interest in it, he would seem to stand in a different relation to the right of soil, in regard to the streets and alleys of the town, from the individual over whose soil a public road is established, and who continues to hold the land on both sides of it. Whether the purchasers of town lots are not, in this respect, the owners of the soil over which the streets and alleys are laid, as appurtenant to the adjoining lots, is a point not essentially involved in this case. If the jury shall find that the ground in question was dedicated to the public as a street or highway, or for other public purposes, to the river, either at high or low-water mark, the right of the city will be established, and the plaintiff in the ejectment must conse- quently fail to recover.

Upon a deliberate consideration of the points involved in the case, this court are clearly of the opinion that the judgment of the circuit court was erro- neous, and it is therefore reversed, and the cause remanded for further pro- ceedings.

IRWIN v. DIXION.

(9 Howard, 10-34. 1849.)

Opinion by MR. JUSTICE WOODBURY.

STATEMENT OF FACTS.— This was an appeal from a decree in the circuit court of the District of Columbia for the county of Alexandria. The proceedings on which the decree was entered had been in substance as follows:

The Dixions, September 6, 1844, filed a bill in chancery, setting out their purchase in October, 1843, of a certain warehouse in Alexandria, "with all the rights and appurtenances to the same belonging," and that they had since been in quiet possession of the same; that this warehouse "fronts, on the east, the river Potomac, and the doors and windows of said front open on a strand, which has been used uninterruptedly as a public highway for upwards of thirty years;" that said strand or street is the great thoroughfare for that part of the town between the river and the last range of warehouses fronting

thereon, and "has always been used as a common and public highway for the free and uninterrupted passage and intercourse of the public;" and that said warehouse and doors and windows "have been erected upwards of thirty years, without any effort or claim heretofore to obstruct the same."

The bill then charged that William H. Irwin, on the 5th of September, 1844, prepared materials and employed carpenters to close up and obstruct the doors and windows of the plaintiffs, thus situated, claiming the right to do the same, and intends forthwith to nail plank over it, or build a fence "just in front of the said warehouse, whereby its use and value would be greatly and seriously injured," and, unless prevented, it "will cut off all direct intercourse between the said front and the said public strand and the river Potomac."

They therefore prayed an injunction to prevent it, alleging it would amount to a nuisance and constitute an irreparable injury to their property, and ask further to have it abated if already erected. An amended bill was afterwards filed on the 21st day of September, 1844, as if at that time original, and varying from the first bill chiefly by describing the fence as then erected and over eight feet high, and obstructing a window in the warehouse, and extending in front of it about eight feet; and averring that Irwin had refused to obey the temporary injunction already issued. It also alleged that a dedication of this land had been made to the public by the respondent and his predecessors, and an easement thereby accrued to the public over it, and that the fence was both a private and public nuisance, and caused to the complainants irreparable damage.

The answer of the respondent, filed in April, 1846, admitted the erection of a fence near the place as alleged in the bill, and constituting an inclosure about twenty-six feet square, but denied that it obstructed, "in any perceptible degree," the light of any of the windows of the complainant, or stood on any public highway. On the contrary, the answer averred that it stood on the "wharf property and pier," which belonged to him, his brother James and sister Ann, in common, from their father's estate, and which had always been claimed, used and belonged to their father and them as private property. After many further allegations in defense, and putting in various exhibits and much evidence on both sides, as appears in detail in the statement of this case, the circuit court declared itself to be fully satisfied that Thomas Irwin, the ancestor of the said defendant, did in his life-time dedicate to the public use a highway passing along the eastern front of said warehouse, etc., "and that the same was used for many years before the filing of the said bill, and that there was next to the said warehouse, and within the said highway, a foot-way about four feet wide, beyond and next to which was a highway for the passing and repassing of carts, carriages," etc., "and the same was commonly used by all persons having occasion to use the same." "And being further fully satisfied that the said defendant did, before the filing of said bill, erect across the said highway a fence, which he hath continued to this day, fully obstructing the passage along the said highway," and, being built immediately adjoining said warehouse and its windows, that it was a special and material injury to the use and enjoyment of the warehouse, the court did adjudge, order and decree "that the injunction heretofore issued in the cause be and the same is hereby made perpetual." The court further ordered that the fence be removed by Irwin, and that he be enjoined from obstructing in any manner said highway "within the space of nineteen feet wide measured east from the eastern wall of said warehouse," etc.

It will be seen that the decree below proceeds chiefly on the ground that a legal public highway exists, running nineteen feet wide east of the warehouse and immediately contiguous to the same, and that a wrong has been done by the respondent by obstructing that highway. It is true that the decree speaks also of the obstruction being injurious to the warehouse and private rights of the plaintiffs, and so does the bill. But the *gravamen* of both is the existence of a public highway where the fence runs.

§ 70. *When an injunction will be granted to private persons to restrain public nuisances.*

In our opinion, whether looking to the private or public rights and privileges which are alleged to be obstructed, this proceeding cannot be sustained. The state of some of the circumstances renders the injunction asked here not a proper form of remedy for the supposed damage to any private interests, and the principal ground of complaint for a public as well as private wrong in preventing travel across the alleged highway is not satisfactorily made out by showing clearly the existence of such highway. As to the first ground of objection. This form of remedy was one much questioned, as permissible either to the public or an individual, in the case of a public right of this kind invaded. 3 Mylne & Keen, 180; 2 Johns. Ch., 380; 16 Ves. 138. And when at last deemed allowable it was only where the community at large, or some individual, felt interested in having the supposed nuisance immediately prostrated on account of its great, continued and irreparable injury; and it was then used as a sort of preventive remedy to a multiplicity of suits, and in cases where an action at law would yield too tardy and imperfect redress. *Osborn v. United States Bank*, 9 Wheat., 840, 841 (CONST., §§ 2363-87); 14 Conn., 581; 21 Pick., 344; *Eden on Injunction*, c. 11; *Jerome v. Ross*, 7 Johns. Ch., 315; 17 Conn., 375; 3 Mylne & Keen, 177; 1 Stor. Eq. Jur., 25. When, however, delay can safely be tolerated, the usual remedy in such cases, by or in behalf of the public, is an indictment rather than injunction. 12 Pet., 98; *Bac. Abr., Nuisance, D.*; *Co. Lit.*, 56, a; 19 Pick., 154; *Willes*, 71; *Wilkes' Case*, 2 Bingh. N. R., 281, 295; 1 Bingh. N. R., 222; 2 Stor. Eq. Jur., 923. And no remedy whatever exists in these cases by an individual, unless he has suffered some private, direct and material damage beyond the public at large, as well as damage otherwise irreparable. *Hawk. P. C.*, c. 75; *Rowe v. Granite Bridge*, 21 Pick., 344; *Stetson v. Faxon*, 19 Pick., 147, 511; 1 Penn. St., 309; 6 Johns. Ch., 439; *City of Georgetown v. Alex. Can. Co.*, 12 Pet., 97, 98; 2 *Ld. Raym.*, 1163; *O'Brien's Case*, 17 Conn., 372; and *Bigelow's Case*, 14 Conn., 565; 3 *Daniell, Ch. Pr.*, 1858; *Spencer v. London & Birm. R. Co.*, 8 Sim., 193; and *Sampson v. Smith*, *id.*, 272; 12 Pet., 98; 18 Ves., 217; 2 Johns. Ch., 382.

In cases of injury to individual rights by obstructions or supposed nuisances, an injunction is still less favored, and does not lie at all permanently, in England and most of the states, unless the injury is not only greater to the complainant than to others, and of a character urgent and otherwise irremediable at law, but the right or title to raise the obstruction is not in controversy, or is first settled at law. See cases hereafter. When all these prerequisites exist, an individual, rather than only a public officer, has been allowed in chancery to obtain a perpetual injunction, though for a supposed public nuisance. 2 Stor. Eq. Jur., 924; 6 Johns. Ch., 439. But it is better for him, whether the nuisance be public or private, when the injury is not great and pressing, to resort for redress to a private action at law; and such, though not the only course, is the one most appropriate and safe. See same cases, and others in

Bac. Abr., Nuisances, B; *Wynstanley v. Lee*, 2 Swanst., 337. In this last case, much like the present, an injunction was refused. So *Attorney-General v. Nichol*, 16 Ves., 339; and *Wilson v. Cohen*, 1 Rice, Ch., 80. One reason for this is the peculiar damage to him beyond that to others, which must be proved, when the extraordinary remedy by injunction is sought in his name, either for a private or public nuisance. Another is, the great, pressing and otherwise irremediable nature of the injury done, which must also be then proved, and which is not entirely without doubt in the present case.

But more especially is this form of remedy not expedient to be adopted, unless indispensable from the character of the damage, as an individual is not, in point of law, allowed at first anything but a temporary injunction to preserve the property uninjured till an answer can be filed admitting or denying the right of the plaintiff, and, if doing the latter, till a trial at law can be had of that right, when desired by the defendant, or deemed proper by the court. And when the right or title to the place in controversy, or to do the act complained of, is, as here, doubtful and explicitly denied in the answer, no permanent or perpetual injunction will usually be granted till such trial at law is had, settling the contested rights and interests of the parties. 2 Swanst., 352; 2 Johns. Ch., 546, in *Johnson v. Gere*; *Storm v. Mann*, 4 Johns. Ch., 21; *Akrill v. Selden*, 1 Barb., 316; *Crowder v. Tinkler*, 19 Ves., 622; *Weller v. Smeaton*, 1 Cox, 102. See *Perry v. Parker*, 1 Woodb. & M., 280; 2 Story's Eq. Jur., §§ 927, 1479; 1 Ves. Sen., 543, *Rider's Case*; 6 Johns. Ch., 46; 3 Daniell's Ch. Pr., 1850 and 1860; *Woodworth v. Rogers*, 1 Railroad Cas., 120; 19 Ves., 144; 617; Bac. Abr., Injunction, A; Anonymous, 1 Bro. C. C., 572; 3 Meriv., 688; 1 Bland, Ch., 569; 1 Vern., 120-270; Amb., 164; *Drewry on Inj.*, 182, 238; 17 Ves., 110; 8 Ves., 89; 2 Bro. Ch., 80; 2 Ves., 414; 7 Ves., 305; *Birch v. Holt*, 3 Atk., 726; 3 Johns. Ch., 287; *Higgins v. Woodward*, 1 Hopk., 342; *Attorney-General v. Hunter*, 1 Dev. Eq., 12; 8 Sim., 189; 14 Conn., 578; *Hilton v. Granville*, 1 Craig. & Phil., 283; *Harman v. Jones*, id., 299, 302; *Ingraham v. Dunnell*, 5 Met., 126; 6 Pick., 376; *Wynstanley v. Lee*, 2 Swanst., 333; *Yard v. Ford*, 2 Saund., 172; *Birm. Can. C. v. Lloyd*, 18 Ves., 515 and 211. The true distinction in this class of cases is, that, in a prospect of irremediable injury by what is apparently a nuisance, a temporary or preliminary injunction may at once issue. 1 Cooper's Sel. Cas., 333; *Earl of Ripon v. Hobart*, 3 Mylne & K., 169, 174-179; 6 Ves., 689, note; 7 Porter, 238; *Hart v. Mayor*, 3 Paige, 213; *Shubrick v. Guerard*, 2 Dessaus., 619; 1 Craig. & Phil., 283; 4 Simons, 565, in *Sutter's Case*. But not a permanent or perpetual one till the title, if disputed, is settled at law. 1 Paige, 97; *State v. Mayor of Mobile*, 5 Port., 280, 316. See authorities last cited. In some of the states it is understood that the practice in this last respect is otherwise. In the celebrated case of *Osborn v. The United States Bank*, 9 Wheat., 738 (Constr., §§ 2363-87), it will be seen that the answers (742, 743) did not deny the title of the plaintiffs, and the chief justice says (858): "The responsibility of the officers of the state for the money taken out of the bank was admitted." But a case entirely in point on this difficult question in this tribunal is *The State of Georgia v. Brailsford*, 2 Dall., 406-408. There, a temporary injunction issued, not to pay over money "till the right to it is fairly decided." And on an issue to a special jury, the trial was had before a final decision was made on a permanent injunction. 3 Dall., 1 and 5. This condition of things as to the form of the remedy adopted here, where the damage was so small and the right was in controversy, is very unfavorable to the correctness of the

final decree in the court below, awarding a perpetual injunction to the plaintiffs on their private account, and more especially so far as it rested on any private rights to any part of the open space.

But beside these objections to the course of proceeding followed in this case, the chief foundation for relief of any kind, which is set up here, seems to fail. It is the allegation and decree that a public highway exists in front of the warehouse of the plaintiffs. This seems to us unsupported by the evidence and the law.

§ 71. *A dedication of lands to public uses must rest upon the clear assent of the owner, not merely on lapse of time.*

There is no claim that such a highway was ever legally laid out by the city or county of Alexandria. But the plaintiffs in the court below rely for its existence chiefly, if not entirely, on a user of it by the public as a highway for more than thirty years. The counsel for the plaintiffs have placed it in argument, as is one ground in the amended bill, on the principle that it showed a dedication of the *locus in quo* to the public for a highway, as well as furnishing presumptive evidence, not rebutted here, of a title in the public of a right of way there by long user. First, as to the dedication. It is true that this may at times be proved by a use of land, allowed unconditionally and fully to the public for a period of thirty years or even less. *Cincinnati v. White*, 6 Pet., 431 (§§ 52-59, *supra*); 22 Pick., 78-80. In *Jarvis v. Dean*, 3 Bingham, 447, the public use had been only four or five years, but with the owner's assent. See, also, 6 Pet., 513. "Such use, however," says Justice Thompson, in 6 Pet., 439, "ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment;" and if the time of the use by the public be long, as, for instance, over twenty years, and unexplained, the presumption is strong for a dedication. *McConnell v. Trustees of Lexington*, 12 Wheat., 582; 3 Kent's Com., 445; 6 Pet., 513; 10 Pet., 718.

There is, then, no difficulty here in deciding that the length of time of the user was enough, it having been twenty or thirty years. But the dedication must also be under such circumstances as to indicate an abandonment of the use exclusively to the community by the owner of the soil. 4 Camp. N. P., 16; 1 Camp. N. P., 262; 11 East, 370; 3 D. & E., 265; *Jarvis v. Dean*, 3 Bingham, 447; 22 Pick., 75. Hence, there must not have been, as here, repeated declarations made by the owner inconsistent with any dedication. 7 Leigh, 546, 665; *Livett v. Wilson*, 3 Bingham, 116. Nor must the acts and words be equivocal or ambiguous on that subject.

In short, the idea of a dedication to the public of a use of land for a public road must rest on the clear assent of the owner, in some way, to such dedication. *Nichols v. Aylor*, 7 Leigh, 546; *Johnson's Case*, 8 Ad. & Ell., 99; 1 Hill, 189, 191; 19 Wend., 128; 3 Bingham, 447; 1 Camp. N. P., 262; 6 Pet., 431; 3 Kent's Com., 445; *Sargent v. Ballard*, 9 Pick., 256. This assent may be proved by a deed or unsealed writing expressing such assent, or, as no fee in the land, but only an easement generally, is given, it may be by parol or by acts inconsistent and irreconcilable with any construction except such consent. 6 Pet., 437; 10 Pet., 712; 3 Kent's Com., 428, 450; 7 Johns., 106; 2 Pet., 508; 12 Wheat., 582; 9 Cranch, 331; 4 Paige, 510; 12 Wend., 172; 19 Pick., 406; 4 Mason, 1. Thus, it has been presumed, if one makes a plan of his land in a city with certain streets laid down between certain lots, and sells the lots accordingly, that he thus means to dedicate those streets to the public. See

United States v. Chicago, 7 How., 196, and cases cited there from Wendell; White v. Cowen, 4 Paige, 510; Barclay v. Howell's Lessee, 6 Pet., 506; New Orleans v. United States, 10 Pet., 718. And more particularly is it so if the community are allowed to begin to occupy the streets accordingly. Cincinnati v. White, 6 Pet., 431 (§§ 52-59, *supra*); 10 Pet., 718. But a mere survey of such streets, without selling the contiguous lots or letting the streets be occupied, is not enough. 7 How., 196.

It is not pretended that in any way has such consent been given here except by the acts before referred to and done under the explanatory circumstances accompanying them. Thus, though there is much evidence that from the warehouse eastward to the river and wharf the land has been open or unclosed for twenty or thirty years, and that people and carriages have usually traveled over it in going to and from the warehouse and wharf, yet during that time till the sale of the warehouse to the plaintiffs, that and the open space and wharf have all been owned by one person, and he has used them in any manner deemed by him most proper. On that sale the titles to each became vested in different persons, and this controversy arose about the use of the open space from the warehouse to the wharf, an undivided share in which space and wharf remained in the respondent, and none of it *eo nomine* was conveyed to the plaintiffs. If any private right or privilege to use any part of it for any purpose passed to the plaintiffs, it must have been under the word "appurtenances," in their deed from Irwin of the warehouse and its appurtenances.

But as the construction of the deed in that respect, and of the facts as showing any privilege used here by the owners of the warehouse as belonging to the warehouse, rather than to their interests in the open space and wharf as separate property, cannot be now properly under consideration, as before explained, in a private application for perpetual injunction against an alleged nuisance, when the damage is not great nor clearly irreparable, and the right or title to erect it is still in controversy, we do not examine and decide on the merits as to any private interests supposed to be obtained by that deed. And the question recurs on the other and chief ground for the application and decree,—the existence of a public highway where the fence was erected.

§ 72. *When user by the public will establish a public easement.*

The idea of a clear intent to dedicate the *locus in quo* for that purpose, which we have seen is necessary to sustain it by dedication, is further repelled, as before in part suggested, by the very circumstances that this space while open and thus used was designed for the owner's purposes, rather than for the purposes of others; that it was while the owner of the open space and wharf was the owner of the warehouse also, and had a right to use both for himself; and that, the moment the new owner of the warehouse ceased to have a title to the soil itself in the open space and wharf, the right to use them freely, either by him or the public, was questioned and resisted. Besides this, the space being open for many years, was manifestly convenient, if not necessary, for the accommodation and interests of the owners of all this property, the wharf without this open space being hardly susceptible of any profitable use, and the warehouse not so accessible.

While, then, anybody might be allowed to travel over this space from the warehouse east to the wharf and river, when convenient and not injuring the owner, it would not be because it had been intended to give to the public a right of way over these premises, but because he himself intended to travel over it, and while so doing, and so leaving it open, would not be captious in

preventing others from traveling there. This was not meant to give to others any exclusive rights or privileges there, but merely a favor in subordination to him and his rights, as will be clear from various other circumstances during the twenty or thirty years.

As proof of this, he and his father before the sale were accustomed to use this open space for other private purposes, such as piling wood and lumber, anchors, tobacco, etc., as well as for a passage to and from their wharf; they uniformly continued to pay taxes on it as if entirely private property and not given to any public use, and the city continued to assess taxes on it to them as owners, rather than refraining to do it as in case of highways generally; they made repairs on it when needed, as if open for their own use and advantage, instead of its being repaired by the city as was done with public highways; and they required persons to remove themselves, horses and carriages from it when causing damage or giving offense, and stating at the time virtually that no public privileges existed there.

As soon likewise as William Irwin had no further occasion to keep open the western portion of this open space for his own use and benefit as owner of the warehouse, he fenced it up. Circumstances like these seem entirely inconsistent with the idea that any intended dedication had been made of these premises or the use of them to the public. The effect of these circumstances is to undermine and destroy also the other ground set up by the bill as well as the decree below, that a public highway had been established there, not by dedication, but by over thirty years' use of the land for that purpose by the community.

In order to have a use or occupation accomplish this, it must have been adverse to the owner (3 Kent's Com., 444), whereas this was by his consent. It must, also, have been an exclusive use by the public, whereas this was in common with him for travel, and entirely in him for several purposes of a private character. It must have been, also, acquiesced in by the owner, and not contested and denied as here. *Nichols v. Aylor*, 7 Leigh, 547. It should likewise, in that event, have been treated by the public authorities as a highway in connection with the user and occupation, so as to give notice it was meant to be so claimed; whereas this was not repaired by the city, nor left untaxed to the owner, as in other cases of public roads.

From the very nature of wharf property, likewise, the access must be kept open for convenience of the owner and his customers; but no one ever supposed that the property thereby became public instead of private, and especially under such numerous and decisive circumstances as existed here rebutting such an inference. No length of time, during which property is so used, can deprive an owner of his title, nor give to the community a right to enjoin or abate the owner's fences over it as a nuisance on the ground that they have acquired a legal easement in it. Finally, it is to be recollected that an injunction is what is termed a transcendent or extraordinary power, and is therefore to be used sparingly, and only in a clear and plain case. *Rosser v. Randolph*, 7 Port., 238, 245; 3 Johns. Ch., 48, *semble*; 3 Mylne & K., 180, 181; *Bigelow v. Hartf. Bridge Co.*, 14 Conn., 580.

The decree below cannot under these views be sustained on any of the grounds which have been urged in its support. It must, therefore, be reversed, and the case remanded, with instructions that the bill should be dismissed.

GROGAN v. TOWN OF HAYWARD.

(Circuit Court for California: 6 Sawyer, 498-508. 1880.)

Opinion by FIELD, J.

STATEMENT OF FACTS.—This is an action for the possession of a parcel of land situated in the town of Hayward, Alameda county. The plaintiff traces title to the premises from one Guillermo Castro, to whom a grant of land, of which they are a part, was made by the former Mexican government. The grant was confirmed by the tribunals of the United States, under the act of March 3, 1851, and a patent was issued to the confirmer. The defendant, the town of Hayward, claims that the premises are a part of a tract dedicated by Castro to the public use of the town previously to the conveyance under which the plaintiff asserts title. The main question for determination relates to the validity and permanence of the alleged dedication.

The facts of the case, as disclosed by the evidence, are briefly these: In 1854, Castro, being desirous of founding a village or town on his land, selected for that purpose a portion of it, which included his residence, as a site for the town, and caused it to be surveyed into blocks and streets, and had a map made on which the streets were named and the blocks numbered. Upon this map the town was designated San Lorenzo. The map showed that the streets were to be eighty feet wide, and that the blocks were to be four hundred feet in length and three hundred feet in width. One of the blocks—the one bounded on the north by Webster street, on the east by Castro street, on the west by Watkins street, and on the south by Clay street—was marked “Plaza” on the map. The premises in controversy are a part of this block.

One of the streets, called Castro street, was coincident with the county road running between San Leandro, the county seat, and San Jose, the county seat of Santa Clara county. The map was filed by Castro for record on the 2d of December, 1854. Subsequently two sales of parts of blocks bounded by streets as laid down on this map were made by him. In 1856, for the purpose, as is said, of securing to himself a lawn or yard in front of his house, he caused the street bearing his name to be resurveyed, and he located it sixty-six feet farther west than it was located according to the map of 1854. The block occupied by him as his residence was thus widened sixty-six feet, and all other blocks and streets west of him were pushed sixty-six feet to the westward. A new map was then made of the town, showing the streets and blocks as thus changed, and on the 8th of April, 1856, was filed in the office of the recorder of the county. Soon afterwards Castro street was opened, and the county road made to conform to it, and since then, now a period of over twenty years, has been continuously used as a street of the town, and as part of the public highway from San Leandro to San Jose. A copy of the map was exhibited in the office of Castro to parties seeking to purchase lots in the town, and lots were sold by him and his agent, and deeds executed with reference to it, or the lots were bounded by streets designated upon it. The block marked “Plaza” was spoken of by them as reserved for public use, and sales of portions of it were refused for that reason.

The plaintiff derives whatever title he has from the purchaser at a sale made in 1864 upon a foreclosure of mortgages upon the tract of land embracing the town of San Lorenzo, executed by Castro in 1858, 1859 and 1862. The name of the town was subsequently changed from San Lorenzo to Hayward, and under this latter name was incorporated by the legislature in March, 1876.

The act of incorporation authorized the board of trustees created by it "to provide for inclosing, improving and regulating all public grounds at the expense of the town," and of course to take control of them for that purpose.

Some time prior to January 5, 1877, Luis Castro, son of Guillermo, as county surveyor, by direction of the board of trustees, made a survey of the town in accordance with the map of 1856, and the survey was finally approved and the map officially adopted by an ordinance passed January 6, 1877. The plaintiff, Grogan, at the time claiming under conveyances from Castro and the holder of the mortgages mentioned (subsequently the purchaser on their foreclosure), constructed warehouses on a part of the block marked on the map as the plaza, and occupied them from 1864 to 1877. In the latter year these warehouses were burned down, and soon afterwards the authorities of the town took possession of the ground as part of its public plaza. Hence the present suit.

Upon this statement of the case there ought to be no doubt as to the judgment of the court. In the light of adjudications almost without number in the courts of the several states, and in those of the United States, the law as to what constitutes a dedication of private property to public purposes, so as to be beyond the recall of the original owner, would seem to be settled.

§ 73. *Dedication defined.*

A dedication of land for public purposes is simply a devotion of it or of an easement in it to such purposes by the owner, manifested by some clear declaration of the fact.

§ 74. *When a dedication becomes irrevocable.*

If nothing beyond the declaration be done—if there be no acceptance by the public of the dedication and no interest in the property be acquired by third parties—the dedication may be recalled at the pleasure of the owner. But if the dedication be accepted by the public authorities of the place where the property is situated, or contracts for a valuable consideration be made by others founded upon a supposed appropriation of the property to the uses indicated, the dedication becomes irrevocable. In the one case the acceptance completes the transfer of the property or easement in it from the owner to the public; in the other case the contract with the owner estops him from asserting any interest except in common with the purchasers from him.

§ 75. *Sale of property with reference to a map representing streets and public grounds.*

In the present case the intent of Castro to dedicate the streets and the block marked "Plaza" in the town of San Lorenzo was manifested in the most open and public manner. The filing in the office of the county recorder of the map containing a designation of the streets and blocks, as set apart for public uses, was a public declaration of the fact. Whether, if nothing further had been done by him, there would have been any such interest acquired by the public as to forbid a subsequent assertion of ownership, may be questioned. But when by the sale of property by reference to the map filed, or bounded by streets marked upon it, other parties had become interested in the property set apart for public uses, the owner was precluded from asserting his original rights. The sale by the map, or with reference to the streets upon it, was a sale not merely for the price named in the deed, but for the further consideration that the streets and public grounds designated on the map should forever be open to the purchaser and to any subsequent purchasers in the town. This was an essential part of the consideration. The purchaser took not merely

the interest of the grantor in the land described in his deed, but, as appurtenant to it, an easement in the streets and in the public grounds named, with an implied covenant that subsequent purchasers should be entitled to the same rights. The grantor could no more recall this easement and covenant than he could recall any other part of the consideration. They added materially to the value of every lot purchased.

§ 76. *No acceptance by the public authorities is essential to complete a dedication.*

No formal acceptance by the public authorities of the dedication upon which the counsel for the plaintiff so much insist was essential. No such acceptance could have been had until the town was organized by the legislature. Until then there were no officers of the public to express an acceptance, and Castro held the legal title of the property dedicated in trust for the public, being precluded by his sales from the assertion of ownership freed from the public easement. A formal acceptance by the public authorities of a dedication may be necessary to impose upon them the duty of protecting the property and keeping it in a condition to meet the uses designed—as for instance to open and repair a street,—but it is in no respect essential to complete the dedication and preclude the original owner from revoking it. The dedication is irrevocable when third parties have been induced to act upon it and part with value in consideration of it. Nor is this irrevocable character of the dedication affected because the property is not at once subjected to the uses designed. In many instances, perhaps the greater number, there may be no present need of the land for the purposes contemplated, as in the case of streets and parks laid out upon a tract added to an existing city to meet its supposed future growth, or, as in the present case, upon a tract selected as a site for a new town. In such cases it is understood that the property will only be subjected to the uses intended as it may be from time to time needed to meet the growth of the place. If an immediate subjection were required in such cases the object of the dedication would be defeated.

As already indicated, adjudications in cases similar to the one now before the court are numerous, and in all of them, without exception, the views here expressed are sustained. One of them—*Rowan's Executors v. The Town of Portland*, 8 B. Mon., 232—may be mentioned as especially learned and instructive upon the subject.

The change in the position of some of the streets sixty-six feet further west of their original position, as shown on the map of 1854, when only two sales had been made, does not appear to have met with any objection from the previous purchasers; and the subsequent sales according to the map of 1856, and the approval by the trustees of the town of the survey of 1877, made in accordance with it, would seem to obviate all objections to the change, even if the plaintiff were in a position, as he is not, to contest its validity.

The mortgages, upon the foreclosure of which the land was sold and the grantor of the plaintiff acquired his title, were executed after this dedication had become irrevocable, and the purchaser at the mortgage sale took whatever rights he acquired in subordination to the interest of the public represented since the incorporation of the town by its authorities.

§ 77. *Adverse occupation creates as against the public no right to land dedicated to it.*

As to the defense that the statute of limitations of the state has barred the action, it is sufficient to refer to the decisions of the supreme court of Cali-

fornia in *Hoadley v. The City of San Francisco*, 50 Cal., 265, and *People v. Pope*, 53 id., 437. According to them, no one can acquire by adverse occupation, as against the public, the right to a street or square dedicated to public uses. The construction given by the supreme court of the state to the local statute is conclusive upon this court.

It follows that the finding of the court upon the issues presented must be for the defendant, and judgment will accordingly be entered in its favor.

UNITED STATES *v.* ILLINOIS CENTRAL RAILROAD COMPANY.

(Circuit Court for Illinois: 2 Bissell, 174-181. 1889.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—The questions involved in this case are of the very highest importance, affecting interests of great magnitude, and they should be more fully considered and opportunity given for further argument and investigation. I do not propose now to do more than state the conclusions at which I have arrived, with perhaps some incidental argument indicating why I have reached those conclusions.

The facts stated in the bill are not controverted and are substantially these: After the litigation concerning the south fraction of section 10, in township 39, range 14, east of the third principal meridian, upon which Fort Dearborn was situated, had been settled by the decision of the supreme court of the United States, reported in the case of *Wilcox v. Jackson*, 13 Pet., 498, in favor of the right of the United States to the land, the secretary of war, under the act of congress of 1819, proceeded to dispose, by sale, of a portion of the land, the right and title to which had been determined to be in the United States by this decision. With the view of facilitating the sale, Mr. Burchard, in 1839, as the agent of the government, made a plat of the land, dividing it into lots, blocks and streets, etc., by analogy and in conformity with the practice existing under the law of the state concerning town plats. This plat was recorded in the recorder's office. Upon the plat, thus made and recorded, there was a strip of land, south of Randolph street and north of Madison street, and between certain lots and blocks and Lake Michigan, designated as "public ground forever to remain vacant of buildings," and by a memorandum added to the plat, it was declared that "the public ground between Randolph and Madison streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description." Sales were made at the time of many of the lots, in conformity with the plat, and title given under the authority of the secretary of war.

In 1850, congress granted to the state of Illinois certain lands for the construction of a railroad from Cairo, with branches to Chicago and Galena; and by an act of the legislature of 1851, of this state, the Chicago branch of the Illinois Central Railroad was terminated at Twelfth street, in the city of Chicago. By a subsequent act in 1852, authority was given to the Illinois Central Railroad Company to proceed from Twelfth street to the south branch of the Chicago river, and by a contract made with the city, and an ordinance effecting the same, between the city and the railroad company, a track was constructed about four hundred feet east of Michigan avenue, and from Twelfth street to the south branch of the Chicago river. The bill alleges that this was done without authority on the part of the United States, and that the latter was not a party in any way to the arrangement.

It will be seen from what has been stated after the land had been thus set apart, in the way described, that the city of Chicago assumed a certain control and authority over it, making the contract and passing the ordinance upon that assumption. The track thus made by the Illinois Central Railroad Company was used from the time of its construction up to the passage of the recent act of the legislature of April 16, 1869, which has given rise to this controversy. By that act there was granted to some of the defendants a tract of land described as the south fraction of section 10, for the erection thereon of a passenger depot, and for "such other purposes as the business of said companies may require." In consideration of this grant, thus made by the act of the legislature, the railroad companies, the Illinois Central, Chicago, Burlington & Quincy, and Michigan Central, were required to pay to the city of Chicago \$800,000 in the manner therein described; and the common council of the city of Chicago were authorized and empowered to quitclaim and release to the Illinois Central Railroad Company and others any and all claim and interest affecting the said land.

The bill alleges that under this act of the legislature these companies threaten to proceed and erect buildings upon the land thus described and set apart for the special public purpose mentioned. Although the bill has a wider scope as affecting the rights of navigation, yet the only question now submitted is whether, as the case is presented, they have a right, under this act of the legislature, thus to proceed.

§ 78. *Attempted dedication under the statute.*

First, as to the position of the United States touching this land, the south fraction of section 10. There can be no doubt, I think, under the facts as stated, that with the consent of the government, through its authorized agent, the land was dedicated to public use of the kind and character mentioned. It may be asked whether this dedication was what is called a statutory dedication, or whether it was a dedication at common law. I think it was a dedication at common law, and not under the statute. It is true that there was an attempt to conform to the conditions required by the law in relation to town plats. It was made out and recorded, but all the various provisions required by law do not seem to have been complied with. And I understand the rule to be that, if they are not, it is not a statutory dedication, the effect of which is to vest in the public the fee to the streets and public grounds named and designated upon the plat as such; and this seems to be the result of the decision in the case of *United States v. Chicago*, 7 How., 185. That decision could not have been made if the supreme court of the United States had supposed that the title in fee of the streets was vested in the city of Chicago as representing the public. It was a question that necessarily arose in that case, and one submitted and certified up to the supreme court, and upon which the decision of that court was required and given.

§ 79. *Distinction between a general dedication and a dedication to special uses.*

It seems to me that a distinction can be taken between a dedication which is general, without any restriction or limitation, and a special dedication for a particular purpose. Here the condition annexed to the dedication was "*public ground forever to remain vacant of buildings.*" The United States, therefore, hold the title in fee to the land subject to the dedication which had been affixed to it, having, however, no control over it inconsistent with the purpose for which it was dedicated, but, as I apprehend, still having entire control over it consistent with that purpose.

§ 80. Property specifically dedicated to certain public uses cannot be diverted therefrom.

Then, there being this special dedication, the question is as to the power of the general public over it, either the city of Chicago, for certain purposes, representing the rights of the public, or the state of Illinois, for other purposes, so representing them, and of course independent of the power exercised over it as public ground merely, about which there is no controversy here. It is the undoubted right of every person owning property to dispose of it in such a manner as he chooses, consistently with law and public policy. It is, therefore, the right of every property holder, unless there is some law or some public policy which prevents, to dedicate his property to public use, general or special; and I apprehend there could not be and was not any law, state or federal, to prevent the special dedication of this property in the way in which it was designated on the plat by the agent of the government. That being so, when property is thus dedicated, what are the rights of the public over it? Can they change the object and purpose of the dedication? Would not this be interfering with the undoubted right of every person to dispose of his property as to him shall seem fit?

§ 81. The right of eminent domain as respects land dedicated to public use.

There may be, perhaps, some force in the argument which declares that when property is dedicated generally to the public, without specifying the particular purpose, the public may use it for one purpose at one time and for another at a different time; but where the owner of property dedicates it to a particular public purpose, being not inconsistent with the law or public policy, I deny the right of the state or of the municipality to divert it from that purpose, except under the general authority which the public has to take property for public uses, which is sometimes termed the right of eminent domain. If an individual shall grant a lot of land or square in a city for the purpose of constructing a school-house upon it, or a church, or an institution of science, or for any useful public purpose, that property cannot be taken, as I apprehend, by the public, except in the same way that any property can be taken. In one sense, the property of every man, of course, is subject to the control of the government, but then, when thus subject to the government, it is in conformity with law, and, in our system, under the adjudication of the law by the courts. It is not alone by a simple stroke of legislation, and I think none of the authorities that have been cited are inconsistent with this principle.

The case of *Williams v. New York Central R. Co.*, 16 N. Y., 97, proceeds upon the correctness of this doctrine. There the owner of land dedicated a portion of it to the use of the city of Syracuse as a public street. The legislature undertook to grant to the railroad company a portion of the street for a railroad track. The court of appeals of New York held that it could not be done without accountability to the owner of the street. And although some cavil is made with this decision in the case of *The People v. Kerr*, 27 N. Y., 188, still the principle of it is conceded. The case of *Wellington* and other petitioners, reported in 16 Pick., 87, is in conformity with this doctrine. The opinion of Chief Justice Shaw proceeds upon the basis that there had not been a diversion, by the act of the legislature, of the land from the public use to which it was appropriated by the owner. That undoubtedly is a strong case, where the question distinctly came up.

The case of *Wager v. The Troy Union R. Co.*, 25 N. Y., 526, is also in conformity with this principle. In fact, what safety would there be in any other

rule than this? And when it is enunciated, coupled with the qualification that the state may take the land for public purposes under the right of eminent domain, there certainly cannot be any objection to it; *salus populi est suprema lex*; and this leaves the right of the individual over his property, and the rights of the state, in harmony with each other, maintaining in full force the right of the owner to annex such qualification to the disposition of his property as he chooses, subject, however, to that supreme law which looks to the safety of the state, and which authorizes the appropriation of the property when that safety demands it.

Now what is done in this case? Is the action of the state or of these defendants in conformity with this principle? It grants to these companies the right of the state of Illinois in this land. What is that right? It can only be independent of the easement, and so far as the owner of the property is concerned, the right to appropriate it for public use in conformity with law. Has the legislature of the state the right to divert land which has been appropriated to a special purpose from that purpose, and say that in consequence of that they will give such a compensation to the owner? Is not this what this act does, to all intents and purposes? It declares that, in consequence of the grant made by the state of Illinois, these defendants, the railroad companies, shall pay to the city of Chicago \$800,000 only, while the bill alleges the value of even that part of the grant inclosed between Madison and Randolph streets to be \$2,500,000. It is certainly a diversion, so understood, so contemplated, and not denied by counsel, from the purpose for which the land was originally dedicated. If this was not the object and purpose, for what were the \$800,000 to be given to the city of Chicago?

§ 82. *Remedy of donor for diversion of land dedicated to public uses.*

True it is said that there are rights affecting this property. There is the right of the owners of lots abutting upon the property; the right of prospect; the right of air and view. That is one thing. But has not the public, in relation to the various streets and public grounds, certain rights as well as owners of lots abutting upon the streets, public squares? And is that right, by a mere stroke of the pen, to be taken away from each individual of the public, where the ground is dedicated to a special purpose? In other words, can a mere legislative enactment close up our public streets and parks and squares? Is there nothing required to give effect to it, and is the individual to be left without any other redress, except what may rise indirectly by an action against the wrong-doer, which shall sound in damages? This will not be claimed. This is not claimed, as I understand, in this case.

§ 83. *The grantor to public uses may prevent the abrogation of such uses by bill in equity.*

It is said that all that is granted by this legislative act is the rights of the public; that the rights of individuals have to be affected by some other proceeding. That may be true. There can be no doubt, I apprehend, of the right of every individual owner who may be injured by the wrongful act of these defendants to proceed against them for that injury, and to apply to the court for redress. What is the result in the meantime? The land thus taken, if used for the purpose claimed under this law, can be built up. In other words, the condition annexed to the dedication, declaring that this land was forever to remain vacant of buildings, can be nullified by the construction of buildings and depots. It would seem as though there should be a preventive remedy which may arrest this violation of the dedication, rather than to leave

the parties to the inadequate redress of an action at law and sounding in damages, merely.

Then, I hold that these principles are true in this case; that the United States remained the owner of this land, subject to the use conferred upon the public by the dedication that was made; that neither the state nor the city has a right to divert the land from the special dedication thus affixed to it, except by the exercise of the right of eminent domain, which must be, not alone by an application to the legislature, but by an application in conformity with the law, and where the rights of the parties can be ascertained. Injunction granted.

§ 84. *Alluvial additions.*—Alluvial additions to land subject to public use partake of the same character. *Barney v. Keokuk*, * 4 Dill., 593. See § 2.

§ 85. Not only an intention to dedicate, but an act manifesting such intention, is essential to make a valid dedication of property to public use, but no particular formality is required. *Robertson v. Town of Wellsville*, * 1 Bond, 81. See § 18.

§ 86. No particular formalities are required to make a dedication. The assent of the owner, and the use of the premises by the public for the purpose intended by the appropriation, are sufficient. *Morgan v. Railroad Co.*, 6 Otto, 716. Approved, *Ruch v. Rock Island*, 7 Otto, 693.

§ 87. *Long user.*—Dedication may be established by user for a period of twenty years. But such user, to constitute a prescription or dedication by prescription from acquiescence in such user, must have been adverse under some real or pretended claim of right, and it must have been exclusive. *Nelson v. City of Madison*, * 3 Biss., 244; *Robertson v. Town of Wellsville*, * 1 Bond, 81.

§ 88. Thirty-eight years' use of a common or public square as such is itself evidence of a dedication. *Bowman v. Wathen*, 2 McL., 376.

§ 89. No particular time of user is necessary to establish a dedication to the public. It is sufficient if it be used by the public with the owner's assent for such time that an interruption would be an injury—each case depending on its own circumstances. *Parish v. Stephens*, * 1 Or., 59, 69; *Lownsdale v. Portland*, 1 Or., 381; S. C., *Deady*, 1. See § 20.

§ 90. Use of land by the public, with other facts and circumstances, may warrant the inference of a dedication. *Chapman v. School District*, * *Deady*, 139.

§ 91. *Parol.*—Although a dedication of streets and public grounds in a town may be shown by acts and declarations in parol, they ought to be of such a public and deliberate character as would make them generally known, and not of doubtful import. *Lownsdale v. City of Portland*, * *Deady*, 39. See § 14.

§ 92. A dedication by parol, being contrary to the general policy of the law, can be established only upon clear proof of the owner's assent, deliberately made. *Chapman v. School District*, * *Deady*, 139.

§ 93. *Effect of platting.*—A map showing a street between two parallel lines, with a strip between the street and a river, laid off in lots and blocks, shows the strip is not dedicated to the public. *Lownsdale v. The City of Portland*, * *Deady*, 39.

§ 94. The mere omission to divide portions of the property within the limits of a town into lots or blocks does not operate *ipso facto* as a grant or dedication of such parts. *Nelson v. City of Madison*, * 3 Biss., 244.

§ 95. The fact that a square in a town plat is not numbered or subdivided, and without anything upon it designating the object for which it is appropriated, does not amount to a dedication. *Ruch v. City of Rock Island*, * 5 Biss., 95, 99.

§ 96. The fact that an agent appointed to lay out an addition to a city and sell the lots projected the streets on the plan made by him into lands reserved does not amount to a dedication of the streets beyond the reserved line. *United States v. Chicago*, 7 How., 185.

§ 97. *Sales by a map.*—A deed referring to a plan of a town, which is recorded, designating a space between a street and river as "commons," constitutes a dedication. *Bowman v. Wathen*, 2 McL., 376. See § 26.

§ 98. The proprietor of a town who represents, by means of a map or otherwise, that certain squares are appropriated for public purposes is concluded by his representations, where they have been acted upon by the public or by purchasers. *Bayliss v. The Board of Supervisors*, * 5 Dill., 549-556.

§ 99. Where one sells land by a map on which streets are laid out but not opened, this constitutes a dedication of the streets to public use. *Barney v. The Mayor, etc., of Baltimore*, 1 Hughes, 118.

§ 100. Land between high and low water mark.—The exercise of the public right of navigation, which exists over land between high and low water mark so long as the same is unreclaimed by the owner, is no ground to presume a dedication to the public. *Richardson v. City of Boston*, 19 How., 263; S. C., 24 How., 188; *City of Boston v. Lecraw*, 17 How., 426.

§ 101. By municipal corporation.—A city corporation may, unless specially restricted, dedicate property owned by it to public use, and cannot recall its act after the public right has attached. *Illinois, etc., Canal Co. v. St. Louis*, 2 Dill., 70 (CORP., §§ 1996-2000).

§ 102. By equitable owner.—It seems that in the case of a dedication by an equitable owner the after-acquired legal estate attaches to the dedication as soon as acquired by operation of law. *Lownsdale v. Portland*, Deady, 1. See § 19.

§ 103. By mere occupant of public land.—A dedication by a mere occupant of public land does not bind the title which he or one to whom he surrenders his possession afterwards acquires. *Chapman v. School District*,* Deady, 139; *Lownsdale v. Portland*, Deady, 1; *Lownsdale v. Portland*,* Deady, 39; *Nelson v. City of Madison*,* 8 Biss., 244. See § 6.

§ 104. Who bound.—A dedication does not bind a person not in privity with the donor. *Chapman v. School District*,* Deady, 139.

§ 105. School-house site.—Less evidence is required to establish a dedication of land for streets or public squares in a town, than for a school-house site, on account of its greater probability. *Ibid.*

§ 106. Reputation to prove.—A dedication cannot be proved by reputation where it is alleged to have been made within the memory of living witnesses. *Ibid.*

§ 107. Question of fact.—The presumption of a dedication is to be made by the jury under the advice of the court as to what facts if proved will justify it. *City of Boston v. Lecraw*, 17 How., 426.

§ 108. Fee does not pass.—In a common law dedication of land for streets, etc., in a town, the fee remains in the dedicator subject to the public easement. *Banks v. Ogden*, 2 Wall., 57; *Barney v. Keokuk*,* 4 Dill., 593.

§ 109. Limitation of use.—Land dedicated to public use may be appropriated to every use within but to none without the scope of the dedication. *Illinois, etc., Canal Co. v. St. Louis*, 2 Dill., 70 (CORP., §§ 1996-2000).

§ 110. The extent of a dedication—its scope—remains the same, but the mode of using the property may change according to the wants of the public. *Ibid.*

§ 111. The erection under the sanction of a city of an elevator to be used at a wharf, under the direction of the municipal authorities, is within the scope of a wharf. *Ibid.*

§ 112. A street upon a river may be used as a wharf. *Barney v. The Mayor, etc., of Baltimore*, 1 Hughes, 118; *Barney v. Keokuk*,* 4 Dill., 593.

§ 113. Change of use.—The dedication of a public square to general public use does not preclude the legislature from modifying the use. *Leger v. Rice*,* 8 Phil., 168. See §§ 4, 11, 23, 30.

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DOMESTIC RELATIONS.*

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I. HUSBAND AND WIFE.

1. *Marriage*.

[Consult the index to CONTRACTS, CONSTITUTION AND LAWS and CRIMES.]

SUMMARY—*Capacity to marry, and place of contract*, § 1.—*Prohibition in decree of divorce*. § 2.—*Intermarriage of blacks and whites*, § 3.—*Common law marriage*, §§ 4-8.—*Evidence of marriage*, § 9.

§ 1. The capacity to marry depends on the law of the place where the marriage is contracted. *Ponsford v. Johnson*, §§ 10-13.

§ 2. A prohibition to remarry in a decree of divorce is a penalty operative only within the state, and a valid marriage may be made by the prohibited party in another state, especially if the other person marrying married innocently and in good faith, without knowledge of such prohibition, and the marriage conformed to the laws of the state where such marriage was celebrated. *Ibid*.

§ 2. A statute of Georgia which prohibits the intermarriage of blacks and whites does not contravene the fourteenth amendment to the constitution of the United States, nor what is known as the "civil rights bill" of 1866, re-enacted in 1870. *Ex rel. Hobbs & Johnson*, §§ 13, 14.

§ 4. A marriage good at common law is valid notwithstanding a state statute, unless express words of nullity are used therein. This rule applied to a statute of Michigan. *Meister v. Moore*, §§ 15-17.

§ 5. A contract to marry *per verba de futuro* with copula does not, *semble*, amount to a common law marriage. *Holmes v. Holmes*, §§ 18-27.

§ 6. Citizens of a state cannot purposely evade its marriage laws by marrying at sea. *Ibid.*

§ 7. The laws of California and Oregon as to the requirement of a formal marriage considered, and held that without observance of the statute formalities the marriage relation is not created. *Ibid.*

§ 8. An agreement between a widower and a prostitute to live together "like" husband and wife, or exclusively of other persons, is distinguishable from an agreement to marry. *Ibid.*

§ 9. A declaration of the deceased husband of a defendant is admissible to the point that his wife's mother was not married to her reputed husband. So, also, is an advertisement published in a newspaper after the separation, and disavowing the marriage, admissible as part of the *res geste*. And upon the question of marriage it is admissible to prove how the parties lived together, and all circumstances of their mode of life and deportment towards one another tending to prove or disprove the marriage. *Jewell v. Jewell*, §§ 28-31. And see *post*, II, PARENT AND CHILD, as to legitimacy and its proof.

[NOTES.—See §§ 32-47.]

PONSFORD v. JOHNSON.

(Circuit Court for New York: 2 Blatchford, 51-59. 1847.)

STATEMENT OF FACTS.—Ponsford was married in New York, where he lived, to Hannah Stanton. She obtained a divorce from him on the ground of his adultery; the decree, in conformity with the statute of that state, forbidding him to marry again during the life-time of said Hannah. While she still lived he married the plaintiff (Amanda), in New Jersey, in due form, and they lived together as man and wife until he died in 1845, his former wife Hannah being still living. Defendant administered on the estate of Ponsford in New York, and refused, upon the application of Amanda, to pay her any portion of his intestate's estate, on the ground that she was not the lawful wife of said Ponsford in his life-time, and therefore could claim nothing as his widow. It appeared that Hannah was still living when the bill was filed. Plaintiff disclaimed any knowledge at the time she married Ponsford that his former wife Hannah was living, but averred that she had been informed by him that he was a widower, his first wife having been dead for many years.

Opinion by BERRIS, J.

This case has been carefully considered by the court, and we are prepared to pronounce judgment in it. The urgency of other engagements since the argument has not allowed us time to draw up at length the reasons in support of the decision. The court is about to adjourn, and the judges cannot have opportunity for further conference previous to November; and, if we defer the decision to that period, a year's delay to the parties may be caused, should an appeal be taken. We shall therefore order judgment to be entered for the plaintiff on the demurrer, only indicating the general grounds upon which the decision is placed.

§ 10. *The capacity to marry depends on the law of the place where the marriage is contracted.*

1. We consider that, as a general principle, the capacity or incapacity to marry depends on the law of the place where the marriage is contracted, and not on that of the domicile of the parties. This principle need not be asserted

as absolute in all cases. Incest, polygamy and practices outraging the moral sense and the usages of civilized nations may be excepted from the rule without impairing its justness and efficacy.

§ 11. *A prohibition to remarry in a decree of divorce is a penalty operative only within the state.*

2. We regard the decree of divorce pronounced by the court of chancery of the state of New York to be, in its purport, and by force of the statute of the state, an absolute dissolution of the marriage contract as to both parties, and that the disqualification or disability to marry declared by the statute attached to Ponsford, by way of penalty, only within the state of New York, and did not incapacitate him from contracting a second and valid marriage in the state of New Jersey, where the same disability did not exist.

§ 12. *It seems that if present parties had wilfully evaded a prohibition to remarry in a decree of divorce, by going out of the state, such second marriage would have been good.*

3. We think that the validity of the marriage in New Jersey would not have been affected if both parties had resorted there to evade the prohibitory law of New York. And clearly, where one party was innocent and ignorant of such purpose, the *mala fides* of the other could not impeach the marriage if it was lawful in all other respects.

Judgment for plaintiff.

EX REL. HOBBS AND JOHNSON.

(Circuit Court for Georgia: 1 Woods, 537-548. 1871.)

STATEMENT OF FACTS.—Hobbs and Martha A. Johnson, the former being a white man and the latter a colored woman, were indicted in the state courts for fornication. A marriage certificate was offered in defense, purporting a marriage ceremony. They were convicted and severally sentenced, and were brought before the United States court by writ of *habeas corpus*.

§ 13. *Fourteenth constitutional amendment and civil rights bill stated.*

Opinion by ERSKINE, J.

Counsel for the relators rely upon the fourteenth amendment to the constitution and the act of congress passed April 9, 1866, commonly known as the civil rights bill. 14 Stat., 27. The first section of the fourteenth amendment declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The fifth section provides that congress shall have power to enforce the amendment by appropriate legislation.

The civil rights bill was, as may be seen, passed a short time before the fourteenth amendment received the sanction of the people of the United States. In May, 1870, congress passed an act to carry into effect the fourteenth and fifteenth amendments, and by section 18 re-enacted the civil rights bill. 16 Stat., 140. The first section of this famous bill of rights is as follows: "That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to

any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding."

§ 14. *The Georgia statute prohibiting marriages between blacks and whites does not contravene fourteenth amendment and civil rights bill.*

The primary but not the only question presented by the relators for consideration is, whether section 1707 of the code (Irwin's) of Georgia is repugnant to the fourteenth amendment and the civil rights bill, or to either of them—whether it invades or abridges any of the privileges or immunities—fundamental rights—secured to every citizen, by the constitution or the act of congress? The section referred to is in these words: "The marriage relation between white persons and persons of African descent is forever prohibited, and such marriages shall be null and void."

This enactment was on the statute book when the state constitution of 1868 was framed. It was said, however, that it was the purpose of the convention to abrogate it by inserting section XI of article I. This is the section: "The social status of the citizen shall never be the subject of legislation." But the supreme court of the state, in June, 1869, in *Scott v. The State of Georgia*, 39 Ga., 321, unanimously held that section 1707 of the code was not in conflict with this provision in the state constitution. McCay, J. (concurring in the judgment of Brown, O. J., and Warner, J.), said: "These and such laws have no bearing on the social status of the citizen. They still leave persons to choose their associates, though they provide that they shall not enter into a particular civil contract."

This being the law of Georgia—this being the interpretation by the supreme court of the state of a clause in the state constitution—which clause or provision has not been challenged here as being obnoxious to the constitution of the United States,—it becomes my duty to ascertain and decide whether section 1707 is an infraction of the fourteenth amendment or the laws of congress made for its enforcement. Though marriage is not unfrequently viewed in our own country, as well as by foreign jurists, as a contract in the common meaning of the term—and, indeed, it cannot be logically denied that it has, in a limited sense, properties which assimilate it to an ordinary contract, being a consentient covenant,—yet it is something more; it is an institution of public concernment, created and governed by the public will of the state or nation. It is a relation which can be annulled only through the intervention of judicial tribunals, unless such power has been also given to the legislature.

Nor, I apprehend, is marriage considered to be embraced within that clause of section X of article I of the national constitution, which prohibits the states from passing any law impairing the obligation of contracts; and Chief Justice Marshall, in *Dartmouth College v. Woodward*, 4 Wheat., 518 (Const., §§ 2099-2117), observes "That the provision in the constitution has never been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of

justice. It has never been understood to restrict the general rights of the legislature to legislate on the subject of divorces." In another part of the opinion, the same great magistrate said: "The framers of the constitution did not intend to restrain the states in the regulation of civil institutions, adopted for internal government." *Id.*, 629. And Mr. Justice Daniel, in *Butler v. Pennsylvania*, 10 How., 416 (Constr., §§ 1827-29), said that "the contracts designed to be protected by the constitution are those by which perfect rights, certain definite, fixed private rights of property, are vested." So, on principle and authority, it is plain that the institution of marriage is not technically a contract, nor can it be said to relate to property.

The brief remarks on the subject of the marriage relation or *status*, and that it is not within the protection of section X, article I, of the original constitution, have been made for the purpose of showing that as words, as a general rule, are to be taken in their natural and ordinary sense, it is to be presumed that the word "contracts," as employed in the civil rights bill, possesses an equivalent and not a narrower or broader meaning than the same word as used in the provision of the constitution just referred to. By looking to the act itself this view will become conspicuously manifest. It provides that the colored citizen shall have the right to make and enforce contracts, sue, be parties, give evidence, inherit, purchase and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by the white citizens — equal privileges and immunities with the white citizen.

In the case of *Live Stock, etc., Association v. Crescent City, etc., Co.*, 1 Abb., 388, which was decided in New Orleans a few days after the passage of the law re-enacting the civil rights bill, but before the re-enactment obtained publicity, Mr. Circuit Justice Bradley (Woods, circuit judge, concurring) remarked that the civil rights bill was *in pari materia* with the fourteenth amendment and was probably intended to reach the same object. And he further said that the court was disposed to hold "that the first section of the bill covered the same ground as the fourteenth amendment — at least so far as the matters in this case are concerned." And, so far as the questions in the case before me are involved, the language of Mr. Justice Bradley comes with direct pertinency.

A careful perusal of the amendment and the bill makes it obvious that the design and object of both was, not only to guaranty, in the larger sense, to every citizen in the United States, the sacred right of equality before the law throughout the whole land, but also to protect from invasion and abridgment all the privileges and immunities — essential rights — that belong to the citizen and which flow from the constitution. And I will here remark that there still lie dormant in the national legislature, under the original constitution and the amendments thereto, vast and various powers which but await such exigencies as are necessary to call them into action.

Any attempt on my part to enumerate or describe the fundamental rights of the citizen comprehended in the words "privileges and immunities," secured by the fourteenth amendment to all the citizens of the United States, would give but an unsatisfactory result. The same words are found in clause 1, section II, article IV, of the original constitution. But that clause applies only to citizens removing from one state to another. And the supreme court of the United States, in *Conner v. Elliott*, 18 How., 593 (Constr., §§ 819-20), declined to describe or define the word "privileges," saying, "it is safer and

more in accordance with the duty of a judicial tribunal to leave its meaning to be determined in each case upon a view of the particular rights asserted and denied therein."

In *Gibbons v. Ogden*, 9 Wheat., 188 (Const., §§ 1183-1201), Chief Justice Marshall said: "The framers of the constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have understood what they meant." And Judge Cooley, in his work on Constitutional Limitations, page 59, uses the following clear and attractive language: "Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government."

And now it may be asked, does section 1707 of the code conflict with the fourteenth amendment, by abridging any of the privileges or immunities secured therein to the citizens—to the relators, white and colored, or deny to them the equal protection of the laws? Or does it conflict with the civil rights bill? The state law prohibits marriage between a white person and a person of African descent, and declares such marriage null and void. If this prohibition is transgressed, neither pains nor penalties follow to either party. But if the parties cohabit, the law of the state deems them guilty of fornication, and punishes them by fine, imprisonment and labor on the public highway, or any one or more of these penalties, in the discretion of the court. Code, secs. 1707, 4245, 4487.

In *Barber v. Barber*, 21 How., 582 (Courts, §§ 903-912), Mr. Justice Wayne, speaking for the court, disclaimed any jurisdiction in the courts of the United States upon the subject of divorces. And Mr. Bishop says: "All our marriage and divorce laws . . . are state laws and state statutes; the national courts, with us, not having cognizance of the matter within our localities." 1 Bish. on Marriage and Divorce, sec. 87.

I have given the matters involved in this suit careful consideration, and I am of opinion that neither congress, in framing the fourteenth amendment, nor the people, when they ratified it, contemplated that questions of this nature were comprehended within the terms "privileges and immunities" as employed in that instrument. The marriage relation, which is a civil institution, has hitherto been regulated and controlled by each state within its own territorial limits, and I cannot think it was intended to be restrained by the amendment, so long as the state marriage regulations do not deny to the citizen the equal protection of the laws. Nor do I think that the state law operates unequally; the marriage relation between whites and colored cannot exist under the statutes of this state—it is null and void as to both. And the punishment or penalty adjudged to the colored citizen found guilty of fornication is like that—and none other—which is inflicted on the white citizen, the co-offender. In my judgment, neither section 1707, which inhibits marriage between a white person and a person of African descent, nor sections 4245 and 4487, which provide for the punishment of colored and white persons who are found guilty of the crime of fornication, fall within the influence of the provisions contained in the fourteenth amendment or the civil rights bill.

It is therefore ordered that the relators be remanded to the custody of the jailer.

MEISTER v. MOORE.

(6 Otto, 76-88. 1877.)

ERROR to U. S. Circuit Court, Western District of Pennsylvania.

STATEMENT OF FACTS.—This was a case of ejectment. Meister claimed as the alienee of the alleged widow and daughter of William Mowry, and Moore as the grantee of his heir-at-law. The question involved was the validity of the marriage of Mowry, in Michigan, to Mary Pero, an Indian. In the court below the judge, construing the marriage act of Michigan, charged that if there was no minister or magistrate present at the marriage it was invalid. There was judgment for the defendant.

§ 15. *A marriage good at common law is valid notwithstanding a state statute, unless express words of nullity are used therein.*

Opinion by MR. JUSTICE STRONG.

The learned judge of the circuit court instructed the jury, that, if neither a minister nor a magistrate was present at the alleged marriage of William A. Mowry and the daughter of the Indian Pero, the marriage was invalid under the Michigan statute; and this instruction is now alleged to have been erroneous. It certainly withdrew from the consideration of the jury all evidence, if any there was, of informal marriage by contract *per verba de presenti*. That such a contract constitutes a marriage at common law there can be no doubt, in view of the adjudications made in this country, from its earliest settlement to the present day. Marriage is everywhere regarded as a civil contract. Statutes in many of the states, it is true, regulate the mode of entering into the contract, but they do not confer the right. Hence they are not within the principle, that, where a statute creates a right and provides a remedy for its enforcement, the remedy is exclusive. No doubt, a statute may take away a common law right; but there is always a presumption that the legislature has no such intention, unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license or publication of banns, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common law right to form the marriage relation by words of present assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity. This is the conclusion reached by Mr. Bishop after an examination of the authorities. Bishop, Mar. and Div., sec. 283 and notes.

We do not propose to examine in detail the numerous decisions that have been made by the state courts. In many of the states enactments exist very similar to the Michigan statute; but their object has manifestly been, not to declare what shall be requisite to the validity of a marriage, but to provide a legitimate mode of solemnizing it. They speak of the celebration of its rite rather than of its validity, and they address themselves principally to the functionaries they authorize to perform the ceremony. In most cases the leading purpose is to secure a registration of marriages and evidence by which marriages may be proved; for example, by certificate of a clergyman or mag-

istrate, or by an exemplification of the registry. In a small number of the states it must be admitted such statutes have been construed as denying validity to marriages not formed according to the statutory directions. Notably has this been so in North Carolina and in Tennessee, where the statute of North Carolina was in force. But the statute contained a provision declaring null and void all marriages solemnized as directed without a license first had. So, in Massachusetts, it was early decided that a statute very like the Michigan statute rendered illegal a marriage which would have been good at common law, but which was not entered into in the manner directed by the written law. *Milford v. Worcester*, 7 Mass., 48. It may well be doubted, however, whether such is now the law in that state. In *Parton v. Henry*, 1 Gray (Mass.), 119, where the question was whether a marriage of a girl only thirteen years old, married without parental consent, was a valid marriage (the statute prohibiting clergymen and magistrates from solemnizing marriages of females under eighteen, without the consent of parents or guardians), the court held it good and binding, notwithstanding the statute. In speaking of the effect of statutes regulating marriage, including the Massachusetts statute (which, as we have said, contained all the provisions of the Michigan one), the court said: "The effect of these and similar statutes is not to render such marriages, when duly solemnized, void, although the statute provisions have not been complied with. They are intended as directory only upon ministers and magistrates, and to prevent, as far as possible, by penalties on them, the solemnization of marriages when the prescribed conditions and formalities have not been fulfilled. But, in the absence of any provision declaring marriages not celebrated in a prescribed manner, or between parties of certain ages, absolutely void, it is held that all marriages regularly made according to the common law are valid and binding, though had in violation of the specific regulations imposed by statute." There are two or three other states in which decisions have been made like that in 7 Massachusetts.

We will not undertake to cite those which hold a different doctrine, one in accord with the opinion we have cited from 1 Gray. Reference is made to them in Bishop, Mar. and Div., sec. 283 *et seq.*; in Reeve's Domestic Relations, 199, 200; in 2 Kent, Com., 90, 91; and in 2 Greenleaf on Evidence. The rule deduced by all these writers from the decided cases is thus stated by Mr. Greenleaf: "Though in most, if not all, the United States there are statutes regulating the celebration of marriage rites, and inflicting penalties on all who disobey the regulations, yet it is generally considered that, in the absence of any positive statute declaring that all marriages not celebrated in the prescribed manner shall be void, or that none but certain magistrates or ministers shall solemnize a marriage, any marriage, regularly made according to the common law, without observing the statute regulations, would still be a valid marriage."

As before remarked, the statutes are held merely directory; because marriage is a thing of common right, because it is the policy of the state to encourage it, and because, as has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of law.

§ 16. *The Michigan marriage statute construed.*

The Michigan statute differs in no essential particular from those of other states which have generally been so construed. It does not declare marriages void which have not been entered into in the presence of a minister or a magis-

trate. It does not deny validity to marriages which are good at common law. The most that can be said of it is, that it contains implications of an intention that all marriages, except some particularly mentioned, should be celebrated in the manner prescribed. The sixth section declares how they may be solemnized. The seventh describes what shall be required of justices of the peace and ministers of the gospel before they solemnize any marriage. The eighth declares that in every case, that is, whenever any marriage shall be solemnized in the manner described in the act, there shall be at least two witnesses present beside the minister or magistrate. The ninth, tenth, eleventh, sixteenth and seventeenth sections provide for certificates, registers and exemptions of records of marriages solemnized by magistrates and ministers. The twelfth and thirteenth impose penalties upon justices and ministers joining persons in marriage contrary to the provisions of the act, and upon persons joining others in marriage, knowing that they are not lawfully authorized so to do. The fourteenth and fifteenth sections are those upon which most reliance is placed in support of the charge of the circuit court. The former declares that no marriage solemnized before any person professing to be a justice of the peace or minister of the gospel shall be deemed or adjudged to be void on account of any want of jurisdiction or authority in such supposed minister or justice, provided the marriage be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage. This, it is argued, raises an implication that marriages not in the presence of a minister or justice, or one professing to be such, were intended to be declared void. But the implication is not necessarily so broad. It is satisfied if it reach not beyond marriages in the mode allowed by the act of the legislature.

The fifteenth section exempts people called Quakers, or Friends, from the operation of the act, as also Menonists. As to them the act gives no directions. From this, also, an inference is attempted to be drawn that lawful marriages of all other persons must be in the mode directed or allowed. We think the inference is not a necessary one. Both these sections, the fourteenth and the fifteenth, are to be found in the acts of other states, in which it has been decided that the statutes do not make invalid common law marriages.

§ 17. *How Michigan courts construe the marriage statute.*

It is unnecessary, however, to pursue this line of thought. If there has been a construction given to the statute by the supreme court of Michigan, that construction must, in this case, be controlling with us. And we think the meaning and effect of the statute has been declared by that court in the case of *Hutchins v. Kimmell*, 31 Mich., 126, a case decided on the 13th of January, 1875. There, it is true, the direct question was, whether a marriage had been effected in a foreign country. But, in considering it, the court found it necessary to declare what the law of the state was; and it was thus stated by Cooley, J.: "Had the supposed marriage taken place in this state, evidence that a ceremony was performed ostensibly in celebration of it, with the apparent consent and co-operation of the parties, would have been evidence of a marriage, even though it had fallen short of showing that the statutory regulations had been complied with, or had affirmatively shown that they were not. Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties,

and which would subject them and others to legal penalties for a disregard of its obligations. This has become the settled doctrine of the American courts; the few cases of dissent, or apparent dissent, being borne down by the great weight of authority in favor of the rule as we have stated it;" citing a large number of authorities, and concluding, "such being the law of this state." We cannot regard this as mere *obiter dicta*. It is rather an authoritative declaration of what is the law of the state, notwithstanding the statute regulating marriages. And if the law in 1875, it must have been the law in 1845, when, it is claimed, Mowry and the Indian girl were married; for it is not claimed that any change of the law was made between the time when the statute was enacted and 1875. The decision of the Michigan supreme court had not been made when this case was tried in the court below. Had it been, it would doubtless have been followed by the learned and careful circuit judge. But, accepting it as the law of Michigan, we are constrained to rule there was error in charging the jury that, if they found neither a minister nor a magistrate was present at the alleged marriage, such marriage was invalid, and the verdict should be for the defendants.

It has been argued, however, that there was no evidence of any marriage good at common law, which could be submitted to the jury, and, therefore, that the error of the court could have done the plaintiff no harm. If all the evidence given or legally offered were before us, we might be of that opinion; but the record does not contain it all, and we are unable, therefore, to say the ruling of the court was immaterial. The case must therefore go back for a new trial. We do not consider the other questions presented. They may not arise on the second trial.

Judgment reversed and new trial ordered.

HOLMES v. HOLMES.

(Circuit Court for Oregon: 1 Sawyer, 99-125; 1 Abbott, 525. 1870.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—This is a suit in equity, brought by the complainant, styling herself Glervina O. Holmes, against Thomas J. Holmes, Jr., his brother Byron, his three married sisters—Mary A. Goodenough, Alice J. Strowbridge and Theresa Coulson—and their husbands, to cancel and set aside a certain deed executed by complainant to defendants, and for assignment of dower in the lands affected by the deed. The bill was filed January 26, 1869, and alleges:

I. That the complainant is a resident and citizen of the state of California, and that the defendants, except Theresa and her husband, are citizens of the state of Oregon.

II. That Thomas J. Holmes, late of Portland, Oregon, died intestate on June 18, 1867, leaving as his children and heirs at law said Thomas J. Holmes, Jr., and his brother and sisters aforesaid; that "complainant was the lawful wife of the deceased and lived and cohabited with him as his wife from the—day of December, 1865, to the time of his death;" "that during the said marriage" and at the time of his death, the deceased was seized in fee and possessed of certain blocks and lots of land in the city of Portland of the value of \$100,000, the annual rents and profits of which are worth \$10,000; that it was not necessary to sell any of said real property to pay his debts, but that the same was inherited by his heirs, who have since partitioned it among themselves; that "complainant is the widow of said Holmes, deceased," and by the

laws of Oregon was and is entitled to dower in said real property; that the present value of such dower is not less than \$25,000; that complainant has never been barred of her dower in said property, and that the same has never been assigned to her, but her right thereto is disputed by said heirs.

III. That said heirs pretend to have purchased and obtained a release of complainant's right of dower, by virtue of a certain deed signed by complainant, July 31, 1867, and by which complainant, styling herself Glervina O. Holmes, conveys to the heirs of Holmes, deceased, "all her right, title, interest, claim or demand, either in law or equity, as the widow of the said Thomas J. Holmes, or otherwise," in and to the estate of said Holmes, in consideration of the sum of \$1,000, "and the further consideration that it was in his life-time our wish and agreement, before and in contemplation of marriage, that upon his, the said Thomas J. Holmes' death, all his property, both real and personal, should descend to his children, the heirs aforementioned, clear of and unincumbered with any claim of dower or any legal claim of myself in any manner whatever;" that said deed "was procured by said heirs to be executed by complainant through fraud, duress and undue influence exerted over her by said heirs, and especially by said Thomas J. Holmes, Jr., and J. M. Strowbridge," the husband of Alice J., aforesaid; and that the consideration of said deed "was grossly inadequate and the recitals therein contained false," and the same was imprudently executed, the complainant being ignorant of the value of her interest in the estate, and unadvised of the nature and effect of said deed.

IV. The bill then sets forth the circumstances and condition of the complainant, at and before the signing of the deed, at great length and with much minuteness, to the effect that the complainant, after the death of Holmes, continued to live in the home house, but that said heirs came there also and took possession; that said heirs then conspired with said J. M. Strowbridge to harass complainant and drive her away from said home and cheat her out of her interest "in the estate of her said husband;" that complainant was then poor and friendless, without means of support, and "in great distress, mental and pecuniary," and without knowledge as to the value of the estate; that she did not sign said instrument freely, but through fear of said Strowbridge and Holmes, Jr., who, "in order to induce her to release her interest in said estate, falsely accused her of criminal intercourse with said Holmes, deceased, prior to his marriage with complainant and before the death of a former wife of said deceased, and represented to complainant that she was liable to a criminal prosecution, and unless she would give up her claim to said estate and leave the house and move out of the state, they would cause her to be prosecuted in the courts and held up to public scandal, infamy and disgrace, and to be punished by imprisonment; and that said Strowbridge and Holmes, Jr., made it a condition of said payment of \$1,000, that the complainant should leave the state, and to that end said sum was made payable, \$500 in Portland and the remainder in ten months after sight at Wells, Fargo & Co.'s in San Francisco.

On April 1, 1869, an answer to the bill was filed, purporting to be the answer of all the defendants except Mary A. Goodenough and her husband, but such pleading was not signed or sworn to by any of the defendants except Thomas J. Holmes, Jr. To this answer the plaintiff, on May 1st, filed exceptions for scandal and impertinence and insufficiency; which were afterwards heard and allowed by the court. On August 21st, the joint and several answer

of all the defendants to the bill was filed, and on September 6th the complainant filed the general replication thereto.

By the amended answer, the defendants admit the allegations of the bill concerning the citizenship of the parties, the death of Holmes, the nature and value of the property of which he died seized, and its subsequent partition among the defendants, his heirs. They deny that the complainant was ever the lawful wife of the deceased, or that he ever cohabited with her as his wife, or that he ever was married to her, or "that any relation created by marriage ever existed between them." They admit the execution of the deed by the complainant to the heirs of the deceased for the consideration mentioned in the bill, but deny that the same was executed by her otherwise than of her own free will and accord.

They aver that for a long time prior to the death of the deceased the said Thomas J. Holmes and complainant "had been lewdly and lasciviously cohabiting together," and that upon the death of said Holmes complainant freely admitted to said heirs that she had never been married to deceased, and acknowledged that she had no claim on his estate. That she was only anxious to obtain sufficient means to go to her father, in Ohio, and leave the state quietly, without exciting comment upon her conduct in having lived illicitly with the deceased, and not desiring to be turned away penniless as a cast-off wanton, and that said heirs being also anxious to prevent the relation which had existed between their father and the complainant from becoming more notorious than possible, and to remove any cloud that might exist upon said estate by reason of said relation, it was mutually agreed between the parties that the said heirs should pay said complainant the sum of \$1,000, and that complainant should execute to said heirs the deed in question; and that, in pursuance of such arrangement, complainant executed such deed, and not otherwise; and that the recitals therein contained were inserted at her special instance and request.

On January 6th and 7th the court heard the evidence of the parties, and on January 11th the cause was argued and submitted.

§ 18. *Chief questions presented in this case.*

Two principal questions arise in the case: 1. Were the complainant and the deceased married to one another; and, 2. Was the deed from the complainant to the heirs wrongfully obtained from her.

§ 19. *Inadequacy of price as a reason for setting aside a sale by the widow of her interest.*

Assuming that complainant was the widow of Thomas J. Holmes, she was entitled to an interest in his property worth at the date of the deed \$25,000. The mere money consideration of the deed — the sum of \$1,000 — is such a grossly inadequate price for property of that value, as to shock the conscience and confound the judgment of a man of common sense. The unprejudiced mind revolts at it, and can only conclude that some advantage must have been taken of the complainant's ignorance or necessities. But then again, the particular charges in the bill, of oppression and conspiracy by the heirs and Strowbridge to defraud the complainant in this matter, are fully denied by the answer and altogether unsupported by the proof. There is no direct proof that complainant was well advised of the value of the property affected by the deed, but at the same time there is every reason to believe, from all the circumstances, that she must have known that it was worth many times what she was receiving for it.

Under what circumstances inadequacy of price will be sufficient to set aside a sale is well stated in two cases cited by counsel for complainant. In *Hough v. Hunt*, 2 Ohio, 502, the court says: "The rule in chancery is well established. When a person is incumbered with debts, and that fact is known to a person with whom he contracts, who avails himself of it to exact an unconscionable bargain, equity will relieve on account of the advantage and hardship. When the inadequacy of the price is so great that the mind revolts at it, the court will lay hold on the slightest circumstances of oppression or advantage to rescind the contract."

In *Osgood v. Franklin*, 2 John. Ch., 23, Chancellor Kent says: "There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a sale made between parties standing on equal ground, and dealing with each other without any imposition or oppression. And the inequality amounting to fraud must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense." When a person gives \$25,000 worth of property for \$1,000, as in this case, the inadequacy is so very gross that the court ought to "lay hold on the slightest circumstance of oppression or advantage," to set aside the sale. The fact itself furnishes good ground to conclude that the party was laboring under some controlling necessity, or was oppressed or was ignorant of the true value of the property.

§ 20. *Inadequacy of price as affected by the question of marriage or no marriage.*

The true explanation of this matter is to be found in the solution of the question — Was the complainant the lawful wife of the deceased? If she was, the inadequacy of the price is so gross and palpable that the inference is almost irresistible that the parties who procured her to sign the deed took advantage of her situation, ignorance or some particular circumstances in her relation to the deceased, to induce or compel her to do so, and thereby intentionally obtained an unconscionable advantage to themselves which they ought not to be allowed to retain.

On the other hand, if the parties were not married, but merely living together in an unlawful manner, the matter is easily explained. The complainant, in that case, being in fact not the widow of the deceased, but only his mistress, would not be entitled to any share or interest in his property, and the deed and the professed consideration therefor would be as stated in the answer, only a plausible and decent sort of a contrivance between the parties to make some pecuniary provision for the complainant so as to enable her to leave the country, and at the same time, as far as possible, conceal from the general public the improper nature of the deceased's relations with her.

§ 21. *Whether there was a marriage in the present case.*

The question of marriage or no marriage is often an embarrassing one to decide, particularly when the evidence is wholly circumstantial and the question arises between the issue of the alleged marriage and third persons, after the parties themselves have passed away. In this case the proof is wholly circumstantial, and the question arises between one of the parties to the supposed relation and the heirs of the other. The suit is maintained by that party not for the purpose of establishing her *status* as the once wife now widow of the deceased, but for the more practical one of obtaining a widow's share of his property as against his children and heirs. In this view of the matter it may be considered as a suit between the deceased and the complainant to determine

a claim to property unembarrassed by any consideration of the consequences of such determination upon the *status* or rights of third persons.

The answer admits the cohabitation of the parties as alleged in the bill, but denies the marriage. The complainant produces no direct proof of marriage, but relies upon the circumstances attending and surrounding the cohabitation as sufficient, in connection with that fact, to warrant the inference that a marriage had in fact taken place between the parties at some time subsequent to the complainant's going from Portland to San Francisco, to meet the deceased on his return from New York.

On the trial the complainant put in evidence four letters written by the deceased to herself while he was making a voyage to New York *via* the Isthmus, dated between October 15 and November 12, 1865, and also one dated December 3, 1865, purporting to be written by John Altman—who is claimed to be the father of complainant—to the deceased. The two sons of the deceased, Thomas J., Jr., and Byron, and his son-in-law, Strowbridge, were examined as witnesses, besides other persons not connected with the family, as to particular acts and declarations of the deceased concerning the complainant and his relations with her.

It appears that at the time of his death Thomas J. Holmes was about fifty years of age, and that the youngest of his children was then quite grown up. That for at least sixteen years he had lived in Portland, and until 1865 with a second wife, not the mother of any of his children, who then died. That the complainant is near forty years of age, and was never married, unless to the deceased. That a few years before 1865 she was living with one Capt. Lyle as his mistress, who then died without making any provision for her; and that afterwards, and before the alleged marriage with the deceased, she was an inmate of a brothel in Portland; and that during some portion of the year 1865, and both prior to and at and after the death of Holmes' second wife, he kept and maintained the complainant as his mistress, in a house belonging to himself, at the corner of C and Third streets, in the immediate vicinity of his home, and where his wife aforesaid and several children then lived.

After the death of Holmes' wife in August, 1865, and sometime in the early part of October of that year, the deceased left Portland on a voyage to New York. A portion of Holmes' children continued to reside in the home house. It was during this separation that Holmes wrote complainant the letters above mentioned. After Holmes left for New York, complainant continued to live at the house at the corner of C and Third streets, at the charge and expense of Holmes, until in the December or January following, when, probably in pursuance of a suggestion from Holmes, she proceeded to San Francisco to meet him on his return from New York. In the month of April, 1866, or thereabouts, both of the parties returned to Portland, and thereafter continued to live together in the home house of the deceased, until his death, in June 18, 1867,—which was sudden and unexpected.

This is a substantial statement of the general circumstances disclosed in the testimony, which tend to show the condition of the parties at or for some time prior to the period when the relation of marriage is said to have commenced between them, and their conduct towards one another afterwards. Besides these there are some special circumstances upon which the complainant relies as testimony to show a marriage between herself and Holmes.

Some time in the summer of 1866, or within two or three months after Holmes returned from New York, Mr. Lakin testifies that Holmes brought

complainant to the store where he was employed and introduced her to him as Mrs. Holmes, and told him to let her have what she wanted and he would pay for it. After this witness "sold her a considerable number of goods." Sometimes she paid for them, and sometimes they were charged to Holmes. Once or twice witness delivered parcels at the home house on C street, and saw Holmes and complainant there as if living together then. Witness had known Holmes well in Portland for fifteen years, but this was all he knew of his relations with the complainant or of any recognition of her as his wife or otherwise.

A. P. Ankeny testified that he had known Holmes many years, and had had confidential conversations with him. That he knew nothing particularly of the complainant, but had known her on the street for two or three years before Holmes' death. Saw Holmes and her together on the street once, and once at Holmes' house. Some two, or three, or four months before Holmes' death, in general conversation with witness, Holmes referred to complainant as his wife, and remarked that he had spent more happy hours in the last six months than for twenty years before. That within three or six months before Holmes' death, at the office at the theater, at request of Holmes, witness, in company with another person, whose name is not remembered, signed a paper as a witness, which he supposed to be a will, and which Holmes then said related to his effects, and that he had made provision for his wife, meaning the complainant. The statements of Mr. Ankeny were somewhat general and indefinite, and he did not profess to give the language of Holmes, but only the substance of it; besides, it is not unlikely that, in the lapse of time, he has in some degree, confounded his general impressions of the matter with the conversations themselves.

D. W. Williams testified that in June, 1866, he was commissioner of deeds for California, and that Holmes asked him to come to his house and take his wife's acknowledgment to a deed for property in California. That he knew Holmes, but not complainant, and that he went to his house, and there Holmes introduced him to a person whom he called his wife, and who signed and acknowledged the deed as his wife. That Holmes also signed and acknowledged, and that both parties told him that the property in question belonged to the wife. That because of some informality in the deed it was returned and re-acknowledged twice before him, under similar circumstances. The testimony of Mr. Williams was direct and certain, and it shows that either the parties were then, or supposed themselves to be, husband and wife, or that they went through this proceeding before the commissioner for the purpose of producing the impression in this community that they were married, so as to prevent their cohabitation from giving rise to unpleasant comment and scandal, or it may have been that they had in some way held themselves out as husband and wife in California, and therefore the purchaser would not take the deed unless executed by Holmes as well as the complainant.

Dr. I. A. Davenport testified that he had known Holmes for some time, and that he first became acquainted with complainant a few weeks before Holmes went to New York in 1865. The complainant was then known by the name of "Clara," and Holmes had introduced her to witness by that name. Soon after Holmes' return from New York, witness said that he introduced complainant to him *as his wife*; but upon further examination he stated the occurrence in these words: "When Holmes asked me to go down to his house I said how shall I address 'Clara?' and he said as Mrs. Holmes." The

witness also testified that he was Holmes' physician, and that he visited the house in that capacity, and that the parties lived together as man and wife up to the time of Holmes' death. It is apparent from the circumstances that Dr. Davenport was upon intimate and confidential relations with the deceased, and also the complainant. For instance, it appears from the correspondence of the deceased, that he repeatedly warns her against receiving visits from men during his absence, but he more than once commends witness to her, both as a physician and a friend. It also appears that witness is not upon good terms with Strowbridge and T. J. Holmes, Jr., and that he is very friendly to complainant and sympathizes with her. Supposing that at this time the parties really were married, it is singular that Dr. Davenport, the confidential friend of both parties, did not know it, and that he should ask Holmes on the way to the house — "How shall I address 'Clara?'" The very question implies that while he knew the parties were living together, yet that he had no reason to believe they were husband and wife, but was in doubt in what light Holmes wished his connection with the complainant thereafter to be regarded. For instance, whether, as in the past, she was to be considered and treated under the professional name of "Clara," simply as his mistress, or whether he wished to impart to the relation some appearance of decency and legality by treating and addressing her *as* Mrs. Holmes. It is also remarkable that, although witness and Holmes were, as we may reasonably suppose, living in daily communication for more than a year after this marriage is alleged to have taken place, nothing appears to have ever been said about it between them, nor does it appear that Holmes in any way ever declared or intimated to witness that he had married complainant, or that she had ceased to be his mere mistress, except on the one occasion, when, in reply to the direct inquiry, he told witness to address her *as* Mrs. Holmes.

Mr. Hamilton Boyd testified that he was well acquainted with Holmes in his life-time, but did not know complainant. That he had a conversation with Holmes, in which H. asked him what he thought of his marriage, as the witness understood, referring to the complainant. Witness "tried to pass it off, and said he knew nothing about it." Holmes repeated the question. Witness replied "he had heard rumors to that effect, but he never believed them." Holmes did not then say that he *was* married, but repeated the question: "What do you think of my marriage?" to which the witness then replied: "It is in very bad taste," whereupon the subject was dropped.

The testimony of this witness was distinct and unqualified. He and Holmes appear to have sustained friendly relations to one another, and no reason is apparent for any concealment or mystery between them about any matter which in itself was lawful and proper. Holmes seems on this occasion, as on others, to have studiously avoided making an explicit admission that he was married to the complainant, while at the same time his conduct and expressions were calculated to give color to the impression or rumor that a marriage of some kind had taken place between them in California, before returning to Portland, in 1866.

The conversation itself is ambiguous and may be considered as evidence, either that a private marriage had taken place between the parties, about which Holmes was then feeling the pulse of his friends as to the propriety of making public, or else that there was no marriage, but some kind of a promise or understanding that there should be one, and he was endeavoring in this

way to ascertain how a marriage with such a person as the complainant would be regarded by his friends and the public.

§ 22. *Whether informal marriage is constituted by words of future promise and a subsequent copula.*

In addition to these special circumstances, the complainant relies upon Holmes' letters to herself, as furnishing sufficient evidence of a promise to marry the complainant at some future time. Assuming the promise *per verba de futuro* to be so proved, it is maintained that this engagement and the subsequent copula, amount in law, to a present consent, and constitute sufficient evidence of marriage. The reason assigned for this conclusion is, that the law presumes the copula was allowed on the faith of the marriage promise; and that so the parties, at the time of the copula, accepted each other as husband and wife.

The proposition is substantially stated in the words of Bishop on Marriage and Divorce, sec. 90, where it is laid down that, in the absence of any statute requiring specified forms and ceremonies, a marriage is constituted by the mere consent of the parties, and that such consent is to be presumed when the copula follows upon a promise to marry in the future. But this doctrine is directly denied in *Cheeny v. Arnold*, 15 N. Y., 345. Denio, C. J., delivered the opinion of the court, which was concurred in by his associates. The syllabus contains the point of the opinion, and is as follows: "A contract to marry, *per verba de futuro*, though followed by copulation, does not amount to a marriage in fact. Such a contract, with cohabitation upon the faith of it, was ground for a decree enforcing a performance by formal solemnization in the ecclesiastical courts, and was for some purposes regarded as a valid marriage by the canon law, but it seems, never constituted a valid marriage at common law."

It must be admitted that there are some *dicta* of American jurists to the contrary of this case, and in accord with the rule maintained by Bishop; but *Cheeny v. Arnold* is later than these *dicta*, and carries with it the authority of an express adjudication. This is a vexed question, but I am much inclined to follow the opinion expressed by Chancellor Walworth, in *Rose v. Clark*, 8 Paige, Ch., 579, that at common law no marriage was valid unless celebrated *in facie ecclesiae*. In the earlier editions of Kent's Commentaries (part 4, 87), it was stated that:

"If the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesiae*." Upon this proposition the supreme court of the United States in *Jewell v. Jewell*, 1 How., 234 (§§ 28-31, *infra*), were equally divided and gave no opinion. In a later edition of the commentaries this proposition is materially qualified by inserting after the words — "it amounts to a valid marriage" *in the absence of all civil regulations to the contrary*. This qualifying clause is found as early as the seventh edition, published in 1851, while the case of *Cheeny v. Arnold* was not decided until 1857. Modified by this clause — in the absence of *all* civil regulations to the contrary — the proposition in Kent amounts to nothing more than that in a *state of nature* no particular form or ceremony is necessary to give validity to the consent of the parties to the contract to become husband and wife, and the same may be said of any other contract.

§ 23. — *evidence further considered on this point.*

But admitting that the law upon this question is with the complainant, and that a contract *per verba de futuro cum copula* constitutes a marriage, is there any such contract in this correspondence? It will not be pretended that it contains any express promise to marry the complainant at any time, or an express admission that an engagement to marry ever existed between the parties. Nor do I think that any such promise or engagement can be reasonably inferred from the correspondence, when read by the light of the surrounding circumstances.

The correspondence consists of five letters, purporting to have been written by Holmes to complainant. They are dated October 15, 16, 24, 29, and November 12, 1865. The first two were written at San Francisco, immediately upon his arrival there; the next two on board the *Golden City*, between San Francisco and Panama, and the fifth and last one at New York. The first one is incomplete, being evidently continued on a second sheet, which is not produced. The omission is unexplained, and the presumption is that the missing portion of the letter would not, if produced, be favorable to the complainant's case, but the contrary. There is no doubt about the authenticity of the letters. Mr. Shattuck, one of the complainant's attorneys, testified that he received the letters from the hand of his client, a short time before she left for San Francisco, and that she left for that place about one and a half months before this suit was commenced. Byron Holmes also testifies that they are in the handwriting of his father.

The letters are addressed to "Dear Clara," and are quite voluminous. Their general character is all that can be stated here. Here and there they contain expressions which readily admit of being understood in a gross and indecent sense. The language and sentiments of the correspondence, and the topics discussed in it, clearly indicate that the parties had been living in a state of concubinage or worse, and that the relation between them was a mere convention by which they agreed *hereafter*, to commit fornication *only with one another*. The writer is constantly assuring the complainant of his continence and fidelity to her, notwithstanding the many strong temptations which surround him, and as constantly cautioning the complainant against visiting houses of prostitution or entertaining other men at her house.

True, there are some expressions in the correspondence that may be construed as indicating that it was the purpose of the writer to marry the complainant when he returned, if her conduct was satisfactory during his absence. Among these, the strongest are, that he regretted that he had forgotten the kind of goods she wanted for a wedding-dress, but would get something. That "the woman I marry must conduct herself during my absence so as to be above suspicion." "If you wish to become an honored wife, you must not visit houses of prostitution." No engagement to marry is alluded to, nor is the word "wife," or "marriage," or "marry" used, except as above stated.

Considering the previous lives and relations of these parties, an actual promise to marry cannot reasonably be inferred from this correspondence. At best, it is merely evidence of a purpose or understanding that thereafter the complainant would give up her former vocation and live with Holmes, exclusively, as his mistress.

Another circumstance connected with the correspondence remains to be considered. In the letter of November 12th, Holmes writes that he is about ready to return to Portland, but that he will first visit complainant's father, in Ohio,

and that he would leave New York, for that purpose, on the 14th inst. Whether he went or not does not directly appear, but I infer not. However, a letter is produced in evidence, dated "Felicity, Ohio, December 3, 1865," addressed to "Mr. Thomas J. Holmes," and signed "John Altman," and indorsed in the handwriting of Holmes—"From John Altman to Thomas J. Holmes." This letter came from the custody of the complainant with the others. It is brief, and begins by acknowledging the receipt of one from Holmes of "17th of November, with \$20, inclosed, for which you will please accept my thanks," and proceeds—"you also desire my consent to a union with my daughter. Upon this delicate question I hope my consent is given to a gentleman of honor, of kind heart and tender feelings, and that the result will be for the good and happiness of you both in the future. With these few lines, hoping to hear from you soon, I subscribe myself yours, respectfully."

It cannot be denied that, upon the face of this letter, it is asserted that Holmes, in his of the 17th of November, had in some way made a proposal of marriage with "Altman's daughter." What her name was, and why the proposal was accompanied with the exact sum of \$20, does not appear. But why is not the letter from Holmes containing this proposal produced? If received by complainant's father it is presumed to be in his custody and at her service. If it was lost or destroyed, she could have her father's deposition taken and prove that fact and its contents. The omission to do this is sufficient to cast suspicion upon the integrity of this so-called Altman letter.

Besides, one would hardly think that Holmes would deem it necessary to ask permission of her father or any one else, unless it was his own family, to marry a person in the situation the complainant then was and had been. Admitting, however, that the letter was written by complainant's father, in response to one from Holmes, asking her hand in marriage, it cannot be believed, in the light of all the other circumstances, that either Holmes or the complainant ever seriously intended anything by such proposal other than to make an impression upon some one. For instance, the complainant knowing, or having good reason to believe, that she was regarded at home as a lost or fallen woman, might have suggested or assented to this application as a means of restoring herself, in some degree, in the estimation of her family and friends.

§ 24. *Marriage not proved in this case, but illicit cohabitation.*

These are all the special circumstances relied upon by the complainant to prove a marriage in fact between herself and Holmes. Neither the time or place of the alleged marriage is stated in the bill, and in the argument for complainant it was claimed that it might have taken place, either in Oregon or California, or at sea between here and Panama. Admitting that the marriage might have taken place where there were no civil regulations prescribing specified forms and ceremonies as necessary to give validity to the consent of the parties, in my judgment these circumstances are not sufficient to prove either a marriage *per verba de futuro cum copula* or *per verba de præsenti*.

The question of marriage or no marriage in this case arises between one of the parties to the alleged relation and the legal representatives of the other. The determination of it does not involve the rights or *status* of innocent third persons, who have honestly given credit to and acted upon the appearances of a marriage between the parties, or who are the issue of such parties, under circumstances where marriage was even possible. The complainant claims one-third of the property left by Holmes, as against his own children and natural

hairs, upon the single ground that she was his lawful wife at the time of his death. The burden of proof is upon her to show this fact, and it is not sufficient to show that there *might* have been a marriage, but she must prove the fact directly, by the evidence of those who witnessed the contract, or by such an array of circumstances as admit of no other reasonable conclusion. It must also be a lawful marriage, contracted or celebrated according to the law of the land. The complainant contributed nothing to the accumulation of this property. She is in no sense or degree the meritorious cause of it. She went from a brothel to live with the deceased, even while his second wife was still living, and was supported by him in ease and luxury for nearly two years. She bore him no children, and probably rather gained than lost by the transaction. This is the extent of her merit so far as this property is concerned. Whatever she is entitled to, the law gives her as the *widow* of the deceased, and not otherwise, and she cannot complain if she is required to prove with reasonable certainty, the fact upon which her claim rests—a marriage with the deceased.

§ 25. *Oregon and California marriage acts construed, in further connection with the facts presented.*

Now, if any marriage ever took place between these parties, it must have been either in the state of Oregon or California. There is nothing in the evidence to warrant the conclusion that the parties ever met elsewhere, except on the steamer on the return voyage from San Francisco to Portland. This court takes judicial knowledge of the law of California. Upon the subject of marriage it provides: "No person shall be joined in marriage unless such person shall have first obtained a license therefor, from the clerk of the county court, . . . which license shall authorize any judge, etc., to celebrate and certify such marriage." Hittell's Laws Cal., 4466. This language is mandatory, and prohibits persons from being joined in marriage except upon the conditions therein prescribed.

The law of this state provides similarly: "Before any persons can be joined in marriage, they shall produce a license from the county clerk . . . directed to any person, etc., authorized by this act to solemnize marriage, and authorizing such person, etc., to join together the persons therein named, as husband and wife." Or. Code, 785.

But what follows is still stronger and more direct: "In the solemnization of marriage no particular form is required, except that the parties thereto shall assent or declare in the presence of the minister, priest or judicial officer solemnizing the same, and in the presence of at least two attending witnesses, that they take each other to be husband and wife." Or. Code, 783.

The consent to become husband and wife—the contract out of which arises the relation—must be given as herein prescribed—before a person authorized to solemnize marriage, and in the presence of two witnesses. Without the observance of these formalities, the marriage relation, it seems to me, cannot be created within the states of Oregon and California, particularly the former. Neither ought it to be. To prevent fraud and litigation, the law wisely requires certain contracts to be in writing, and signed by the parties. A single rood of land cannot be conveyed except by the deed of the vendor. How much more important it is to society and individuals that the contract upon which rests the marriage relation, the most important of all others, should not be made except with such attending circumstances and formalities, as will serve to manifest the consent of the parties beyond question, and also preserve the evidence of it. For instance, if this marriage was contracted in Oregon

or California, according to the laws of either state, it would have been done before some person authorized to celebrate marriage and make a record of it, by which the fact could be proven directly, and beyond dispute.

§ 26. *Effect of an evasive marriage at sea.*

Nor do I think that citizens of this state, as the complainant and deceased were, can purposely go beyond its jurisdiction, and not within the jurisdiction of another state, *as at sea*, and there contract marriage contrary to its laws. Such an attempt to be joined in marriage is a fraudulent evasion of the laws to which the citizen of the state is subject and owes obedience, and ought not to be held valid by them.

§ 27. *Cases discussed as to informal marriages.*

In *Milford v. Worcester*, 7 Mass., 48, a certain man and woman came before a magistrate authorized to celebrate marriage, and requested him to marry them. He refused, but the parties then and there, in the presence of the magistrate and other witnesses, declared that they took one another for lawful husband and wife, each making to the other the vows and promises usual in contracting marriages. The statute does not require any form of words for the solemnization of marriage, but that the contract was to be solemnized before a justice of the peace or minister. The action was by the issue of these parties claiming to be their legitimate children, and the question was, whether there was a valid marriage or not between their parents, and it was determined in the negative. Parsons, C. J., delivered the opinion of the court. In the course of it he says:

"Marriage being essential to the peace and harmony, and to the virtues and improvements of civil society, it has been, in all well regulated governments, among the first attentions of the civil magistrate to regulate marriages: by defining the characters and relations of the parties who may marry; so as to prevent a conflict of duties, and to preserve the purity of families, by describing the solemnities by which the contract shall be executed, so as to guard against fraud, surprise and seduction; by annexing civil rights to the parties and their issue, to encourage marriage, and discountenance wanton and lascivious cohabitation, which, if not checked, is followed by prostration of morals and a dissolution of manners; and by declaring the causes and the judicatures for rescinding the contract, when the conduct of either party and the interest of the state authorize a dissolution. A marriage contracted by parties authorized by law to contract, and solemnized in the manner prescribed by law, is a lawful marriage; and to no other marriage are incident the rights and privileges secured to husband and wife, and to the issue of the marriage."

"It has been truly observed by the counsel for the plaintiffs, that a marriage engagement of this kind is not declared void by any statute. But we cannot thence conclude that it is recognized as valid, unless we render in a great measure nugatory all the statute regulations on this subject."

"But a marriage, merely the effect of a mutual engagement between the parties, or solemnized by any one not a justice of the peace or an ordained minister, is not a legal marriage, entitled to the incidents of a marriage duly solemnized. The woman, when a widow, cannot claim dower, nor the issue seizin by descent."

"Whether cohabitation, after such a pretended marriage, will subject either of the parties to punishment, as guilty of fornication, may depend on circumstances. If either of the parties were circumvented, and verily supposed the marriage legal, perhaps such party would be protected from punishment, on

the general principle that, to constitute guilt, the mind must appear to be guilty. But every young woman of honor ought to insist on a marriage, solemnized by a legal officer, and to shun the man who prates about marriage condemned by human laws as good in the sight of heaven. This cant, she may be assured, is a pretext for seduction, and if not contemned will lead to dishonor and misery."

But I am aware that there are some loose *dicta* scattered through the books to the effect that a mutual engagement to marry between parties capable of contracting marriage is valid, and constitutes a marriage, although not entered into or made according to the forms and before the person prescribed by the local law, unless the same is thereby expressly declared void. Without in any degree assenting to this doctrine, let it be assumed for the moment to be the law applicable to this case, while we consider whether the circumstances justify the inference that any such engagement took place between these parties.

First, it must be borne in mind that under the circumstances there was little or no inducement for marriage between these parties. They had long passed the heyday and romance of youth. Their acquaintance did not commence in innocent and honorable courtship and love, but in a mercenary and criminal commerce. No innocent offspring bound them to one another, or appealed to them for protection and legitimacy. The deceased was a man in the decline of life, with a handsome fortune and a grown-up family of sons and daughters. With him the primary object of marriage—the procreation of children—had been long accomplished, and the secondary one—the avoiding of fornication—does not appear to have much concerned him. The complainant was also well advanced in years, and, considering her past career, was not likely to have sought marriage for either the primary or secondary object of that relation. In my judgment, the most reasonable inference from even the circumstances which are claimed to favor the hypothesis of marriage is that the parties, after the death of Mrs. Holmes, agreed to live together *as* man and wife, that she was to be faithful to him, and he to her, as long as they lived or remained connected. This, of course, was not an agreement then to marry, but to live together *like* husband and wife. Holmes had wealth and a home, and she was poor and out of the pale of society. She had lived as the mistress of one man, and afterwards as a prostitute. As she appears, from the testimony, there is no reason why she should decline to be Holmes' mistress, or why he should go so far as to offer her marriage as a consideration for the exclusive enjoyment of her person or society.

The parties having agreed to live together upon this footing, it was only natural that in some respects, particularly when third persons were present or concerned, they should treat one another as man and wife. Besides, Holmes had lived long in this community, and may be expected to have had some regard for appearances, as well for his own sake as that of his children around him. Indeed, at times, for this reason, he may have seriously contemplated marrying the complainant; but when he sounded his friends about the matter, as in the conversation with Boyd, and heard their opinion of the propriety of it, he shrunk back or procrastinated the matter. He might also have intended to have made provision for her in case of his death, which was sudden, and, doubtless, many years before he expected it.

But this agreement to live together bound neither of them, nor did it change their *status* or relation to one another. Living together as man and wife, although evidence of a previous marriage, particularly so far as third persons

are concerned, cannot make parties man and wife. Nor can any length of cohabitation, however exclusive, ever constitute the relation of marriage. Marriage is a relation, as much so as that of parent and child. It is founded in contract—in the consent of the parties. That consent must be mutual and absolute *per verba de præsenti*,—not merely to live together exclusively, but to become joined to one another in the estate of matrimony.

In *Letters v. Cady*, 10 Cal., 527, the plaintiff sued as the widow of Cady for a share of his estate. Her complaint avowed that in 1853 she “was keeping a restaurant and public saloon in Grass Valley, and that she had accumulated in this business five or six hundred dollars; that the deceased made proposals of marriage to her, which she accepted, and consented to live with him as his true and lawful wife; that in accordance with his wishes she relinquished her business, sold her property, ‘and from thenceforth lived and cohabited with him as his wife, always conducting herself as a true and faithful and affectionate wife should do.’” There was a demurrer to the complaint.

Field, J., delivered the opinion of the court. After stating the case as above, the opinion proceeds:

“These are all the averments respecting the marriage, and they are entirely insufficient. The facts alleged do not constitute a marriage. They are only *prima facie* evidence of a marriage. Living together ‘as man and wife’ is not marriage, nor is an agreement so to live a contract of marriage. From the character of the allegations and the pregnant fact that the plaintiff does not even sue in her marital name, except under an *alias*, we are led to the inference that the arrangement between her and the deceased was intended to be temporary, and the connection one to which it would be a perversion of language to apply the name of marriage.”

But there are other circumstances disclosed by the testimony, the necessary inferences from which are overwhelmingly against the hypothesis that any marriage or contract of marriage ever took place between these parties, besides the direct testimony of some of the defendants to the admissions of the complainant to the contrary.

Byron Holmes, the younger son of the deceased, testified that he lived in the home house with the parties from the time of their return from San Francisco, in the spring of 1866, to the death of his father; and that he never heard the complainant addressed or spoken of by the deceased or other person otherwise than as “Clara.” That he never asked her, directly, if she was married to his father, but in conversation she often told him, both before and after his father’s death, that she claimed none of his property, and in reply to a question from complainant’s counsel, he swore positively that in a certain letter, written by deceased to witness from San Francisco, in March, 1866, he did not inform witness that he had married complainant, but did say to him “that he had not or would not marry her.” The witness also said that he had not this letter in his possession, but would produce it if counsel desired, but its production was not insisted upon by complainant.

Thomas Holmes, Jr., and Strowbridge, the administrators of the estate, both testified that soon after the death of Holmes, and while complainant was still in the house of the deceased, they conversed with her about her right to administer upon the estate, and informed her that if she had a certificate of marriage with Holmes, her right to administer should not be questioned. At first she said she had a certificate, but had promised Holmes never to produce it or show it to any one; but upon further conversation she burst out crying and

acknowledged that she had no certificate, and had not been married, and that it was the second time she had been fooled or deceived. Said she desired to go to her father, near Cincinnati, and wanted to know if witnesses could not raise her a certain amount of money to go with. Of course the fact must not be overlooked that these defendants have a large pecuniary interest in the result of this suit. But that does not necessarily discredit their testimony, although it furnishes a reason why it should be carefully considered and scrutinized. Judging from the manner of the witnesses, the intrinsic probability of their statements, and the absence of any direct contradiction of them, I see no sufficient reason for not believing them.

A. Johnson, called by complainant, testified that he had known Holmes for about fifteen years, but did not know complainant. That he was quite intimate with him, but never heard him say anything particular about complainant, and never heard him refer to her as his wife or speak of being married. Add to this, that it does not appear that any one ever visited or received them as husband and wife, or that they ever appeared in public together, and that notwithstanding all the friends and acquaintance which Holmes, from his wealth and long residence, must have had here, no one is produced who ever heard him say that he was married to the complainant.

The very fact that the complainant released all interest in the property of the deceased, worth \$25,000, for the insignificant sum of \$1,000, is itself enough to raise the presumption that she did not then believe herself the widow of Holmes, and legally entitled to one-third of his property. True, she might not have been aware of the exact value of the property, but she must have known that Holmes was a man of considerable fortune, and that the dower of his wife was worth many thousand dollars. His wealth appears to have consisted almost wholly of town property in the city of Portland, and from her residence in the city and intimacy with the deceased, she must have had a tolerably correct impression of the value of his estate. I am unable to discover anything in the evidence or the circumstances of the parties to justify the conclusion that any advantage was taken of the complainant to obtain this release. She was of mature age, had seen the world, and was not likely to have been prevented by shame or mortification from coming before the public and asserting her rights, if necessary. A woman with a reasonable claim for \$25,000 upon a solvent estate of a deceased person need not want for friends to assert her claim in this country. She appears to have had communication with persons outside of the family of the deceased. Dr. Davenport visited her more than once, and Ferry once. They both conversed with her privately. Ferry appears to have taken an interest in her, and advised her that the best friend she could have was a good lawyer, and doubtless would have procured her an interview with one at any time. Dr. Davenport appears to have been her friend, as well as physician, and if she had desired it, was abundantly capable, and doubtless willing, to aid her in the assertion of any right she might have had as the widow of Holmes. Indeed, there is not much room to doubt but that he knew, directly or indirectly, from the parties themselves, what the real relation between them was; and I am satisfied that if he had had reason to believe that complainant was ever married to Holmes, he would have counseled and assisted her to maintain her right as his widow. Taken altogether, considering particularly the gross inadequacy of price, this sale of dower must have been either brought about by the defendants obtaining some controlling and unconscionable advantage over the com-

plainant, or else it was a mere amicable and plausible contrivance between the complainant and defendants, to give the former an opportunity to leave the country with sufficient means for respectable appearances, and at the same time conceal from the public, as far as possible, the fact that she and their father had been living together in a state of concubinage. In support of the first proposition there is only the single fact of the gross inadequacy of price, and that is a sword that cuts both ways, while all the facts and presumptions of the case are either reconcilable with, or directly tend to establish, the truth of the second one, and I have little doubt but that it is the correct conclusion from the premises.

In pursuance of this contrivance, and as part of it, the recitals concerning the complainant's agreement not to claim the property of the deceased were inserted in the deed, and she was also described therein and in the petition for letters of administration as the widow of Holmes. It can't be possible that any woman knowing herself to be the lawful wife of Holmes, and entitled to his name and one-third of his comparatively large fortune, would quietly consent to relinquish all this for \$1,000, and also to leave the country, under circumstances which she must have known and felt were a tacit admission to the contrary.

But the insuperable objection to the theory of marriage in this case arises from the silence of the complainant. If it be true that she was ever married to Holmes according to law, or that he ever attempted or pretended to marry her in any way, or by any means, or that he ever promised to marry her, the complainant knows it, and can state the fact with the essential circumstances of time and place. A woman is not likely to forget when and where she was married, whether according to the forms of law or otherwise. In this case there is every inducement for the complainant to state the fact, if it be a fact. Her honor and a fortune are depending upon it. That she is not insensible to the latter consideration the bringing of this suit bears witness.

Yet she does not even state in her bill that she was married to Holmes. She only alleges, in general terms, that she "was the lawful wife of the deceased, and lived and cohabited with him *as* his wife, from the — day of December, 1865, to the time of his death." Whether she was "the lawful wife of the deceased" or not is a question of law and fact, and no facts are stated on which to base the conclusion that she was, except that she "lived and cohabited with him *as* his wife"—that is, *like* his wife, after the manner of a wife. Now, *living* with the deceased, however long or in whatever manner, would not make her his wife. Marriage is the legal result of a mutual and absolute engagement between the parties to be husband and wife. Prescription nor copula, either singly or combined, can never constitute marriage.

Again, the allegations in the bill, indefinite and unsatisfactory as they are, are not sworn to by the complainant. The bill, although it need not have been sworn to, is verified by one of complainant's solicitors, who, upon this point, speaks, of course, from mere information derived from the complainant.

But why does she not appear here as a witness, or give her testimony by deposition, and inform the court particularly when and where and by what means she became the lawful wife of the deceased, and why, if such be the case, she released her dower, worth \$25,000, for the paltry and inadequate sum of \$1,000? The complainant is a resident of San Francisco, and there was nothing to prevent her from being a witness in the case, either in person or by deposition. The withholding of her testimony, under the circumstances,

gives good ground for presuming that it would be adverse to her claim. She asks this court to infer from circumstances that she was the lawful wife of Holmes, when she declines to come forward and testify to the fact under the sanction of her oath.

This circumstance alone is enough to convince any one that, whatever agreement or understanding there was between her and Holmes as to living together—and I have no doubt there was some—they never were married or engaged to be married, in any sense of the word.

A decree must be given dismissing the bill.

JEWELL v. JEWELL.

(1 Howard, 219-234. 1843.)

ERROR to U. S. Circuit Court, District of South Carolina.

Opinion by **TANEY, C. J.**

STATEMENT OF FACTS.—This is an action of ejectment brought by the plaintiffs in error against the defendants, to recover a house and lot in the city of Charleston, in South Carolina. The plaintiffs claim to be the lawful wife and children of Benjamin Jewell, deceased, who, it is admitted, died intestate and seized of the premises in question. The defendants also claim to be the lawful children of the same Benjamin Jewell, by Sophie Storne, who, before her marriage, was named Sophie Prevost, who is still living and has conveyed all her interest to her children, and the rights of the parties depend altogether upon the validity of this marriage. At the trial in the circuit court, the verdict and judgment being in favor of the defendants, the case is brought here by a writ of error sued out by the plaintiffs.

The questions before this court appear in the two bills of exception taken by the plaintiffs. The testimony as set forth in the record is voluminous, and in many instances contradictory. But a very brief statement will show the points of law which have been brought here for revision, and it is unnecessary to incumber the case with the mass of testimony which was offered to the jury by the respective parties, in order to prove or disprove the marriage in controversy.

The plaintiffs proved the marriage of Benjamin Jewell, on the 30th of June, 1812, with Sarah Isaacs, one of the lessors; and that the other lessors of the plaintiff are the issue of that marriage.

The defendants, in order to show that they, and not the plaintiffs, were the heirs at law of Benjamin Jewell, examined Sophie Storne, who stated that she was married to Benjamin Jewell, at Savannah, in Georgia, in 1794, or 1795, by a magistrate whose name she did not recollect, in the presence of several witnesses; that the said Jewell was a Jew, and the witness a Catholic; that her mother would not consent that she should be married according to the Jewish form, and that Jewell would not consent to be married according to their form, and on that account they were married by a magistrate; that they lived together as man and wife many years, and that the defendants are the issue of that marriage; that they at length separated, and she having heard that Jewell was married again, thought that she also had a right to marry, and accordingly married a certain Joseph Storne, with whom she lived some years, and who is since dead. Various acts and declarations of the parties, and the general reputation in the places where they lived, were also offered in evidence on the part of the defendants, to prove that the said Jewell and Sophie had lived

together as man and wife, and had constantly acknowledged and spoken of each other as such.

To rebut this evidence, and to show that the connection of the parties was merely concubinage, and not marriage, several instruments of writing, alleged to have been executed by them at different times, were offered in evidence on the part of the plaintiffs, and also various acts of the parties and the general reputation in the places where they lived.

After this evidence on the part of the plaintiffs and defendants had been given to the jury, the plaintiffs offered the declarations of one Simons (the deceased husband of one of the defendants), that his wife's mother was not married to her father. It was objected to by the defendants, and rejected by the court.

The plaintiffs also further gave in evidence, that the separation took place in Charleston, in the month of December, 1810, where it was admitted that the parties had been living together for many years, and then produced a file of the Charleston Courier for the year 1811, and proved that the manuscripts or originals from which the paper of that day was published are lost or mislaid; that it was at that time the leading commercial paper in Charleston; and thereupon offered to read from the file the following notice, as published on the 22d of January, 1811, and for three successive weeks from that time, namely:

“NOTICE.

“The subscriber forbids all persons from giving credit to Mrs. Sophie Prevost on his account, as he will pay no debts whatever she may contract.

“BENJAMIN JEWELL.”

But the court refused to allow the evidence to be read; and these two points of evidence form the subject of the first exception.

The second exception brings up the question as to what constituted a legal marriage in Georgia and South Carolina, in one or the other of which states the parties had always lived from the time of their original connection. Several instructions were asked for on both sides, some of which would appear not to have been controverted; and the points before this court will be better understood, by excluding all the prayers on both sides which do not form a part of the exception, and are therefore not now the subjects of review in this court. The exception is confined to the third and sixth instructions asked for by the plaintiffs, and to the first asked for by the defendants. They are as follows:

3. That if the jury do not believe that Benjamin Jewell and Sophie Prevost were married by a magistrate in Savannah, in the year 1796, or before that time, then there is no evidence of a marriage before them on which they can find the defendants to be the legitimate heirs of Benjamin Jewell.

6. That a promise to marry at a future time, followed by cohabitation, does not constitute marriage, though the promise be accepted at the time when it was made.

Defendant's prayer: 1. That if the jury believe that before any sexual connection between Sophie Prevost and Benjamin Jewell, they, in the presence of her family and his friends, agreed to marry, and did afterwards live together as man and wife, the tie was indissoluble even by mutual consent.

Whereupon the court gave the instruction requested by the defendant, and refused the third instruction asked for by the plaintiff, and upon the sixth directed the jury that if the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed

by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent) cannot dissolve; and it is equally binding as if made in *facie ecclesiæ*. To this refusal and instruction the plaintiff excepted.

§ 28. *Declarations of the deceased husband of a defendant admissible as to the fact of marriage.*

We proceed to examine the questions presented by these exceptions in the order in which they are stated. The first point in the first exception is upon the rejection of the declarations of Simons, the deceased husband of one of the defendants. It is true that Simons cannot be presumed to have known of his own personal knowledge the particular fact of which he was speaking, and he must have made the statement upon information derived from others. He does not appear to have named the person from whom he obtained his information, nor to have stated that his knowledge was derived from the general understanding and reputation in his wife's family. But the knowledge of events of this description most generally exists in every family, and hence the declarations of one of its members are admissible, although he does not mention the source from which he derived his information; and such declarations are equally admissible, whether his connection with the family is by blood or marriage. In the case of *Vowles v. Young*, 13 Ves., 140, testimony precisely similar to that now offered was received; and we think the declarations of Simons ought to have been admitted, and that the circuit court erred in rejecting them.

§ 29. *An advertisement published after a separation, disavowing the marriage, admissible.*

The second point in this exception was upon the admissibility of the advertisement in the *Charleston Courier*; and upon this point also we differ in opinion with the circuit court. It was admitted that the parties had cohabited together for a long time, and that the defendants were the issue of that intercourse; and in order to prove that their mother was married to Jewell, the acts and declarations of the parties during their cohabitation were offered in evidence by the defendants (and were unquestionably admissible) to prove that during that time she was acknowledged and treated by Jewell as his lawful wife. Acts and declarations were also offered on the part of the plaintiffs to prove the contrary. The separation took place in December, 1810, in Charleston, where the parties had lived together for many years, and this advertisement appeared in the principal commercial paper of the place in the January following. It was offered by the plaintiff, like the acts and declarations above mentioned, on his part to rebut the testimony which had been given by the defendants; and this advertisement would manifestly have been admissible on the same rules of evidence if it had appeared while the parties were still living together, or at the moment of separation. And although they had parted a short time before the publication, yet it followed so immediately afterwards that it must be regarded as a part of the *res gestæ*, and as one of the circumstances connected with the separation and previous cohabitation. Whether it was inserted by Jewell or not, and if it was, what were his motives for so doing, are questions for the consideration of the jury, and not for the court. The plaintiff had a right to show the fact that such an advertisement did appear at the time mentioned, and it was with the jury to determine the degree of weight, if any, to which this fact was entitled, taking into consideration all the circumstances under which it appeared

§ 30. *Upon a question of marriage it is admissible to prove how the parties lived together.*

As relates to the points contained in the second exception, we think the court were right in refusing the third instruction requested by the plaintiffs. In order to explain the question intended to be raised by this prayer, it is proper to state that, in addition to the testimony of Sophie Storne, hereinbefore mentioned, certain acts and declarations of the parties, which it is not necessary to set forth at large, were given in evidence by the defendants, by other witnesses, to prove that the parties were married at Savannah about the time mentioned by Sophie Storne, and before they cohabited together. The plaintiff, on the contrary, in order to prove that they were not married, and that she went to live with him as his concubine, offered in evidence a paper, purporting to be signed by the parties, and dated March the 10th, 1796, by which there was an open and plain agreement on her part to become the mistress of Jewell. The paper is gross and indecent in its language, and it is unnecessary to state more particularly its contents. The third instruction asked for by the plaintiff is founded upon the assumption that this paper is genuine, and insists that if the marriage did not take place before its date, then the intercourse began under this agreement, and their subsequent cohabitation must be presumed to have been of the same description, unless an actual marriage afterwards was proved. But the answer to the argument is, that the authenticity of the paper is denied by the defendants, who contend that it was fabricated by Jewell, or, if signed by Sophie, that she was entrapped and deceived, and ignorant of its contents. The question, therefore, is open to the jury upon the whole evidence, to determine upon what terms and in what character the connection originally began; and the evidence offered by the defendants, that they lived together for so many years as man and wife, and treated and spake of each other as such, are certainly admissible to show that a marriage had taken place between them at some time or other, and whether before or after the date of the paper could not be material.

§ 31. *A divided court and no decision.*

The residue of the instructions contained in this exception all involve the question as to what constituted marriage, at the time of this cohabitation, by the laws of Georgia and South Carolina. The question has, of course, no concern with the nature and character of the union of man and wife in a religious point of view. But regarding it (as a court of justice must do) merely as a civil contract, and deciding in what form it ought to have been celebrated in order to give the parties the legal rights of property which belong to the husband or the wife, and to render the issue legitimate, the circuit court held, and so instructed the jury, that if they believed that, before any sexual connection between the parties, they, in the presence of her family and friends, agreed to marry, and did afterwards live together as man and wife, the tie was indissoluble even by mutual consent; and that if the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent) cannot dissolve, and that it is equally binding as if made in *facie ecclesiae*.

Upon the point thus decided this court is equally divided, and no opinion can therefore be given. Upon the questions, however, contained in the first exception the judgment of the circuit court must be reversed and a *venire de novo* awarded.

§ 82. **Marriage and capacity to marry.**—Marriage, though a contract, is not a civil contract, and is not affected by section 10, article I, of the constitution, forbidding a state to pass laws impairing the obligations of contracts. *Ex parte Kinney*, 3 Hughes, 17 (CONSTR., §§ 883-95).

§ 33. Marriage is a privilege belonging to persons as members of society, and may be abridged and regulated by state laws. *Ibid.*

§ 34. The Texas law of 1858, forbidding marriage between white persons and negroes, is still in force, and does not violate the fourteenth amendment of the constitution of the United States. *Ex parte Francois*, 3 Woods, 367 (CONSTR., §§ 880-81).

§ 35. A second marriage while a former one subsists is void. *Gaines v. Relf*, 12 How., 472.

§ 36. Law of Louisiana validating for civil purposes a marriage made in good faith, by one competent to contract, with another whom he believes to be competent in law, but who is not. *Gaines v. New Orleans*, 6 Wall., 707.

§ 37. The inquisition, its history, and how far in operation in Louisiana when a Spanish province. Its jurisdiction of marriage and bigamy considered. *Gaines v. Hennen*, 24 How., 553 (§§ 623-37).

§ 38. In a civil suit, a bigamist's confession of his guilt is, under unobjectionable circumstances, sufficient evidence of it. *Ibid.*

§ 39. A decree of divorce for the cause of bigamy relates back to the void marriage, and sets the petitioner free from that time. *Ibid.*

§ 40. Practice considered in indictment against a minister, under Maryland statute, for marrying minors without the consent of parents or guardians. *United States v. McCormick*, 1 Cr. C. C., 593.

§ 41. **Proof of marriage.**—General reputation, cohabitation, and the express recognition of the wife in the will of the husband, are admissible to prove marriage. *Hinde v. Vattier*, 1 McL., 110; *Holmes v. Holmes*, 1 Abb., 525.

§ 42. A former marriage being proved *prima facie*, a subsequent one is void, and the onus rests on the party attacking the former one to prove it illegal. *Gaines v. Relf*, 12 How., 507.

§ 43. A marriage *de facto* is *prima facie* evidence of a marriage *de jure*. *United States v. Jennegen*, 4 Cr. C. C., 119.

§ 44. Indictment for bigamy in the territory of Utah. Points of evidence considered. First marriage may be proved by the admissions of the prisoner, and the intended scope of such admissions may be considered by the jury. But as long as the fact of his first marriage is contested, and until it has been duly established to the satisfaction of the court, the second wife is an incompetent witness. *Miles v. United States*, 13 Otto, 304.

§ 45. Marriage must be proved according to what would be proof of it where it took place. It may be proved by any person who was present and can identify the parties. Proof of a marriage in a foreign country, after the usual forms observed there, is presumptive proof that it was valid. Marriage performed by one habited as a priest raises a presumption that he was a clergyman. Negative testimony of persons that they do not believe one was married cannot impeach positive testimony to the fact of marriage. *Patterson v. Gaines*,* 6 How., 550.

§ 46. Competency of the memorandum of a priest in which he enters marriages as they occur. *Blackburn v. Crawfords*, 3 Wall., 175 (§§ 616-22).

§ 47. **Local statutes.**—According to the laws in force in the Spanish colonies in America, a contract of marriage made before the Spanish magistrate in such colonies, though without the sanction of a priest, was valid, and the offspring thereof legitimate. *Hallett v. Collins*, 10 How., 174. And see *Holabird v. Atlantic Ins. Co.*, 2 Dill., 167, as to Missouri laws of marriage.

2. Marital Rights and Liabilities.

SUMMARY—*Wife's earnings and business*, §§ 48-51.—*Reduction into possession, and wife's equity*, § 52.—*Judgment against wife*, § 53.—*Wife as trustee*, §§ 54, 55.—*Wife's assignment by attorney*, § 56.—*Deed of married woman*, §§ 57-61.—*Louisiana community rules*, §§ 59-68.

§ 48. Purchases of property by the wife of an insolvent debtor are looked upon with suspicion, even though alleged to have been paid for from the products of her own industry. *Seitz v. Mitchell*, §§ 69-72.

§ 49. The wife's earnings while living with her husband are not her separate property in the District of Columbia. *Ibid.*

§ 50. No law in Wisconsin authorizes a married woman to carry on the business of separate trading. Act of 1850, as to the married woman's separate estate, construed as not depriving the husband of his common law right to her earnings. *Avery v. Doane*, §§ 73-76.

§ 51. The husband, though surrendering control of the family business to his wife, remains responsible for goods purchased by her on credit. Nor can the wife become her husband's debtor or be made his garnishee in proceedings against him by creditors. *Ibid.*

§ 52. A married woman's rights in equity and at common law contrasted where a legacy is bequeathed to her. Her equity to a settlement where the husband seeks the aid of a court of equity. Such legacy must be reduced to possession before it belongs absolutely to the husband; and if the latter relinquishes his right, his creditors cannot compel him to reduce it to possession for their benefit. *Gallego v. Gallego*, §§ 77-81.

§ 53. Under the law of Mississippi, a married woman, unless she has a separate estate (which must be averred), is subject to all the common law disabilities of coverture, and a personal judgment against her is void; and this, *semble*, notwithstanding such judgment is assailed collaterally in another action, where it is relied upon as the foundation of a title based on a sale under execution issued on the judgment. *Bank v. Partee*, §§ 82-88.

§ 54. A married woman may be a trustee and may convey the trust property without her husband joining. *Gridley v. Wynant*, §§ 89, 90.

§ 55. A married woman holding property as trustee may execute a valid conveyance thereof through her attorney in fact. *Gridley v. Westbrook*, § 91.

§ 56. California legislation in 1850 considered as to the wife's right to assign by attorney. *Held*, that this act does not apply to married persons who were never within the state. *Bay-erque v. Haley*, §§ 92-97.

§ 57. The common law doctrine that the deed of a married woman is void does not apply in a proceeding for foreclosure of a mortgage. The mortgage before foreclosure and the mortgage note are assignable by the husband alone, and equity will sustain him where the assignment is for valuable consideration, and where, too, he indorses over the note by way of transferring his wife's interest. *Ibid.*

§ 58. The husband is the proper person to join the wife in her suit against another. *Bein v. Heath*, §§ 98-102.

§ 59. Under the Louisiana code a mortgage given by the wife for a loan to the husband, or to the wife covertly for him, is void. *Ibid.*

§ 60. As a rule, and independently of statute, a *feme covert* cannot avoid her conveyance of her property made with the due forms of law, except by alleging and showing mistake or fraud. *Ibid.*

§ 61. Where money is loaned to the wife in good faith, the fact that it is afterwards used to pay her husband's debts does not avoid her mortgage made to secure it. *Ibid.*

§ 62. Under the code of Louisiana a *feme covert* may act fraudulently so as to deprive her of relief in equity. *Ibid.*

§ 63. A married woman cannot, in Louisiana, mortgage her separate property except in the manner prescribed by law. *Reid v. Rochereau*, §§ 103-106.

§ 64. A married woman, by Louisiana law, is not estopped by a declaration in her mortgage that the property mortgaged is community property. *Ibid.*

§ 65. Mingling her paraphernal with the community funds, she becomes a creditor to the amount of her investment and cannot claim the whole as her separate estate. *Ibid.*

§ 66. Under Louisiana law subsequent incumbrancers cannot set aside a conveyance to the wife of the mortgagor, which the creditor has made in pursuance of his agreement with her to buy the property and sell it to her. *Carite v. Trotot*, §§ 107-111.

§ 67. The "separation of property" obtained by a wife in Louisiana is not rendered void by an omission to publish under the code, nor by various other informalities. *Ibid.*

§ 68. The husband's financial embarrassment may justify such "separation of property" in the wife's favor. *Ibid.*

[NOTES.— See §§ 112-189.]

SEITZ v. MITCHELL.

(4 Otto, 580-586. 1876.)

APPEAL from the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The complainant in the court below sought to subject two pieces of real property in the city of Washington to the payment of several judgments recovered by the firm, of which he is the surviving partner, against George Seitz, one of the defendants. His bill alleges the recovery of those judgments, one on the 9th day of June and the other on the 14th day

of December, 1868, the issue of executions thereon, and returns of *nulla bona* made by the marshal. It alleges further, that George Seitz, on the 13th day of January, 1870, purchased from one Kendall, lot No. 61 in square 448, in the city of Washington; and, knowing of the judgments obtained against him, conspired with his wife, Mary E. Seitz, the other defendant, to delay and hinder the judgment creditor, by procuring the deed from Kendall to be made to the wife. The bill then charges that the deed was so made; that the purchase money for the lot was paid by George Seitz with money earned by himself, to which his wife had no title whatever; and that a deed of trust was given to Kendall to secure a balance of unpaid purchase money, which deed was subsequently released to George Seitz and Mary E. Seitz. The entire purchase money was \$6,500.

The bill sets forth that the other lot, part of lot No. 1, in square 343, was purchased on the 18th day of October, 1872, by George Seitz, from one William F. Mattingly, for the sum of \$6,000, and that it was also conveyed to Mary E. Seitz. The purchase money was paid, it is alleged, with money borrowed from the Arlington Fire Insurance Company, and secured by deed of trust of both properties, which money, the bill charges, George Seitz, and not Mary E. Seitz, is bound to pay. This second conveyance is also averred to have been made to the wife with intent to hinder, delay and defraud the husband's creditors; and the prayer of the complainant is that both lots may be subjected to the lien of the complainant's judgments, and that a trustee may be appointed to sell the property for the satisfaction of said liens out of the proceeds of the sale, after paying all expenses thereof and all prior liens. Such is the case made by the bill. No discovery is asked and no interrogatories are propounded.

The answer admits the recovery of the judgments as charged, but denies that George Seitz purchased the property or paid for the same, or owned or advanced any money to pay for the same, and denies also all fraud. It avers, on the contrary, that Mary E. Seitz, in her own right and in her own name, and for her sole and separate property, purchased the Kendall lot, and took the deed in her own name; that she paid the purchase money, to wit, \$1,000 in hand and the balance on deferred time, all out of her own means and money earned and procured wholly by herself, and not from the said George, nor by or through him or his exertions; and that he signed the notes for the deferred payments and joined in the deed of trust at the request of the vendor, and not because he had any interest in the transaction.

The answer further states that the property bought from Mattingly was purchased by the wife for herself in her own name and in her own right; that she negotiated the loan with the Arlington Fire Insurance Company; that the whole transaction was hers, and not that of her husband; that he had nothing to do with it except as her agent, or to express his assent for the satisfaction of other parties. To this answer a general replication was put in, and evidence has been taken on behalf of the complainant. The defendants have rested on their answer alone.

§ 69. *Rule of equity that there must be more than one witness to overbear defendant's sworn answer, explained.*

The general rule of equity practice is, that when a defendant has, by his answer under oath, expressly negatived the allegations of the bill, and the testimony of one person only has affirmed what has been negatived, the court will not decree in favor of the complainant. There is then oath against oath.

In such cases there must be two witnesses, or one with corroborating circumstances, to overbear the defendant's sworn answer. The reason for this is, that the complainant generally calls upon the defendant to answer on oath; and he is, therefore, bound to admit the answer, so far as he has called for it, to be *prima facie* true, and as worthy of credit as the testimony of any other witness. This rule, however, does not extend to averments in the answer not directly responsive to the allegations of the bill, for the complainant has not called for them. It is always to be considered, therefore, when the rule is attempted to be applied, how far the averments of the answer are responsive to what is alleged in the bill.

§ 70. *Purchases of property by wife of insolvent debtor are looked upon with suspicion, even though alleged to have been paid for from the products of her own industry.*

In the case before us the defendants' answer denies that George Seitz purchased the Kendall lot, or paid for the same, or owned or advanced any money to pay for the same. So far it is responsive to the complainant's allegations. But the answer furnishes no evidence that the wife had any separate property or any means or money of her own with which to pay the purchase money of the lot conveyed to her. Nor do the proofs taken exhibit any such evidence. George Seitz and Mary, his wife, lived together. He carried on a bakery, and she attended to the duties of the house. There were four or five boarders in the house, paying monthly from \$20 to \$30 each. There is nothing to show that the wife had any opportunity for obtaining money except from her husband. Purchases of either real or personal property made by the wife of an insolvent debtor during coverture are justly regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate. Such is the community of interest between husband and wife; such purchases are so often made a cover for a debtor's property, and so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contest between the creditors of the husband and the wife, there is, and there should be, a presumption against her which she must overcome by affirmative proof. Such has always been the rule of the common law; and the rule continues, though statutes have modified the doctrine that gave to the husband absolutely the personal property of the wife in possession, and the right to reduce into his possession and ownership all her choses in action. Authorities to this effect are very numerous. In *Gamber v. Gamber*, 18 Penn. St., 306, a case where a wife claimed personal property against the insolvent estate of her deceased husband, it was said by the court: "In the case of a purchase after marriage, the burden is upon the wife to prove distinctly that she paid for it [viz., the property purchased by her] with funds which were not furnished by the husband."

In *Keeny v. Good*, 21 id., 349, where the contest was between a wife and her husband's creditors, it was ruled that mere evidence that she purchased the property during the coverture is not sufficient to give her title; that it must satisfactorily be shown that the property was paid for with her own separate funds, and that, in the absence of such evidence, the presumption is a violent one that the husband furnished the means of payment; and it was held that this rule applies to real, as well as to personal, estate. So in *Walker v. Reamey*, 36 id., 410, a contest respecting real estate, where the purchase was made by a wife in her name, and where the money paid upon the contract, so far as pay-

ment was shown, was paid by her, it was held that a married woman claiming, in opposition to her husband's creditors, property purchased after marriage, must show that she had received money "by will or descent, conveyance or otherwise, and had invested it in the property claimed." It was also said not to be enough that she was seen in the frequent possession of money after the passage of the married woman's act of the state, for, in such case, the presumption is that it was the husband's money. So in *Parvin v. Capewell*, 9 Wright, 89, it was decided that the mere possession of money by a wife is no evidence of her title in an action by a creditor of the husband, and, when there is no evidence save possession, the jury should be instructed to find for the creditor.

Vide, also, *Bradford's Appeal*, 5 Casey, 513, and *Aurand v. Shaeffer*, 7 Wright, 363. So property purchased by a married woman on credit, or with her earnings, has been held to be subject to the levy of an execution against her husband. *Robinson v. Wallace*, 3 id., 129. All these decisions were made after the enactment of a statute giving to married women rights of property as against the husband and his creditors, at least as broad as any which exist in the District of Columbia. And similar decisions have been made in other states where like statutes have been enacted. *Switzer v. Valentine*, 4 Duer (N. Y.), 96; *Glann v. Younglove*, 27 Barb. (N. Y.), 480; *Woodbeck v. Havens*, 42 id., 66; *Rider v. Hulse*, 24 N. Y., 372; *Connors v. Connors*, 4 Wis., 181; *Elliott v. Bentley*, 17 id., 610; *Edson v. Hayden*, 20 id., 682; *Duncan v. Roselle*, 15 Iowa, 501; *Cramer v. Redford*, 17 N. J. Eq., 367. Many of these cases relate to the ownership of the wife's earnings; and nowhere, so far as we are informed, has it been adjudged that her earnings, or the product of them, made while she is living with her husband and engaged in no separate business, are not the property of the husband when the rights of his creditors have been asserted against them.

§ 71. *Wife's earnings while living with her husband are not her separate property in the District of Columbia.*

Certainly the acts of congress respecting the rights of married women in this District do not assure such property to the wife. Section 727 of the Revised Statutes relating to the District of Columbia is as follows: "In the District, the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts."

Section 729 gives a married woman power to contract, to sue and be sued in her own name in all matters having relation to her sole and separate property. No other power to contract is given to her. Her earnings while cohabiting with her husband are not made her property. She can have them only by the gift of her husband, and such a gift is not protected against his creditors.

§ 72. — *these principles applied to the facts here presented.*

Applying the principles settled by the authorities we have cited to the pleadings and proofs in the present case, it is free from doubt. The answer does not aver that Mrs. Seitz paid for either of the lots conveyed to her out of her separate property. It does not aver that she had any separate property, nor does the proof show that she had any. The entire purchase money of the lot obtained from Mattingly was paid with money borrowed from the Arlington Fire Insurance Company, for which George Seitz and his wife gave their notes, accompanied by a deed of trust of that lot, and of the one ob-

tained from Kendall. For the payment of those notes George Seitz is personally liable, and his wife is not. It is not averred or proved that she has paid out of her own means, or in any way, even one cent of that debt.

And in regard to lot No. 61, purchased from Mr. Kendall, the proof is that the negotiation for the purchase was commenced by the husband. He called upon the vendor, and obtained information of the price and of the terms. A month afterwards, the husband and wife went to the vendor's office, and the bargain was there consummated and the deed was given. One thousand dollars, part of the purchase money, was paid by Mrs. Seitz in the presence of her husband; four promissory notes, each for \$600, and one for \$3,100, were given for the remainder. All these notes were signed by the husband and the wife; and a deed of the lot in trust, signed also by the husband and wife, was given to secure the payment of the notes. No evidence has been submitted to show that the first thousand dollars, the down money, was not the property of the husband; while the law presumes that it was, in the absence of proof to the contrary, beyond her having possession of the money. And it does not appear that Mrs. Seitz ever paid any portion of the notes given for the remaining purchase money. They have all been paid, except a small balance of about \$100; and the proof by two witnesses is, that the payments were principally, if not wholly, made by George Seitz himself. The allegation of her answer that she paid the purchase money is, therefore, disproved. But, were it true, it would not avail her, unless she paid it with her own separate property. She avers that she paid it with means and money earned and procured wholly by herself. Of that there is no proof, nor attempt to adduce proof; though, if the fact were so, the means of proving it must have been peculiarly within her knowledge and power, and we have already observed that money procured by her earnings belonged to her husband, and was not her separate property. To hold that conveyances thus taken and thus paid for are sufficient to protect the property against creditors of an insolvent husband would be making fraud both profitable and easy.

Decree affirmed. (a)

AVERY v. DOANE.*

(District Court for Wisconsin: 1 Bissell, 64-69. 1854.)

STATEMENT OF FACTS.—Attachment suit instituted against one Doane, with service on Sarah Doane, his wife, as garnishee. In her answer she states that she has been in the millinery business in her own name at Green Bay, in this state, for eighteen years; that she buys her goods generally on credit in Chicago and New York; that while her husband was doing business in Chicago, he furnished her with goods on credit; that she kept a running account with him; that since his failure she has been giving him his board for his assistance and services. She further states that when she commenced business her father bought most of her stock for her and gave her besides some money as a present.

Motion by plaintiff to try her liability as garnishee under the statute, objected to on the ground that, being the wife of the defendant in the attachment suit, this proceeding will not lie.

(a) Affirming *Mitchell v. Seitz*,* 1 MacArth., 480.

§ 73. *No law in Wisconsin authorizes a married woman to carry on the business of separate trading.*

Opinion by MILLER, J.

There is no law in this state recognizing the custom of London, whereby married women may carry on the business of trade and merchandise as *femes sole*, while cohabiting with their husbands. In some states *femes covert* may carry on business as *femes sole* in pursuance of statutes, while their husbands are engaged as mariners and absent from the country. This is the extent of legislation upon this subject in any of the states within my knowledge. It is unnecessary to refer to authorities to prove that at common law the husband is entitled to the goods and chattels of the wife, and also to all sums of money which she earns by her own skill and labor, and that these he has absolutely in his own right and not in hers. And if she purchases goods or property, during coverture, with his assent, and with the proceeds of her skill and saving, they become his at the moment of the purchase, and he becomes responsible for such as may be purchased upon credit.

§ 74. *Act giving a married woman a separate estate construed as not depriving the husband of his common law right to her earnings.*

It is contended that the act to provide for the protection of women in the enjoyment of their own property, approved February 1, 1850, chapter 44, changes the common law upon this subject. The third section of the act is as follows: "Any married female may receive by inheritance or by gift, grant, bequest or devise from any person other than her husband and hold to her own and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband nor be liable for his debts."

The act provides more effectually for the protection of the wife's property by dispensing with the necessary intervention of trustees, than courts of equity had done, but it does not authorize the wife to hold to her own use, to the exclusion of her husband or his creditors, a stock of goods purchased by her on credit nor the profits or proceeds of trade. By the act she might have held to their exclusion the money given her by her father, but nothing more. That was property given her by a person other than her husband, which she by the act could receive and not be subject to the disposal of her husband, nor liable for his debts. The goods now in the store and the notes, accounts and cash in hand she did not receive by inheritance, gift, grant, devise or bequest from any person other than her husband or in any way known to this act.

The act changes materially the legal incidents of the marriage relation, but it has not extinguished quite all the marital rights of the husband. He is still entitled to the person and labor of his wife, and to the benefits of her industry and economy. The wife by the act is not degraded to the position of a hireling, which she would be if it authorized her to withhold from her husband the proceeds of her own labor, nor is she vested with authority over him, nor independence of him in her business transactions of trade, even if he, as in this instance, after disposing of his goods without paying his debts, should consent to become her servant for his board.

§ 75. *The husband, though surrendering control to his wife, is responsible for goods purchased by her on credit.*

The defendant by voluntarily surrendering to his wife his marital authority

in the control and business of his family cannot compromise the legal rights of his creditors. He may consent to serve his wife in the store for his board, but the law entitles him and his creditors to the goods and proceeds of sales. The persons from whom she purchased goods upon credit with her husband's consent cannot bring suit against her, but must resort to him for the recovery of their demands, although the charges in their books may be to her, or the notes signed by her alone.

§ 76. *The wife cannot become the husband's debtor nor be made garnishee in proceedings against him by creditors.*

As she cannot contract in business of trade in her own name while living with her husband, she cannot sue or be sued in her own name upon transactions connected with the trade, nor be summoned as his garnishee. She can no more be his debtor in this particular than she can hold the goods in store or the avails of sales to the exclusion of him or his creditors. The common law has wisely ordered that property acquired by the wife by purchase, with the consent of her husband, is in his possession and under his control, and the act under consideration does not disturb this provision, so essential to the peace and happiness of families.

The act of this state is copied from that of the state of New York, where a similar decision was made in *Lovett v. Robinson*, 7 How. Pr., 105. And a similar decision of the supreme court of Pennsylvania, upon a similar law, is reported in *Raybold v. Raybold*, 8 Harris, 308. In that case it is decided that the fact that real estate was paid for with the wife's earnings and savings does not give her a trust estate in the property; but that money thus acquired is not the property of the wife within the meaning of the act relating to the estate of married women, but is the property of her husband. For these reasons, the proceedings against Sarah A. Doane are dismissed, and the application for an issue is overruled.

GALLEGO v. GALLEGO.

(Circuit Court for Virginia: 2 Marshall, 285-292. 1826.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—The plaintiff, who resides in Spain, claims a legacy bequeathed to her by Joseph Gallego, deceased. The executor admits assets, and submits the question to the court, whether the plaintiff, as a married woman, can properly demand this legacy? The demand is supported by an instrument of writing, executed by the husband, in which he transfers all his marital rights in this legacy to his wife, and gives her full authority to receive it. Under these circumstances, the course of a court of equity is, to sustain the bill of a married woman, brought by her next friend, and to decree that the legacy shall be paid to herself. But, admitting her right to sue, the executor contends that her husband was indebted to his testator, and that this debt ought to be deducted from the legacy. He also says, that a creditor of the husband has attached a part of this money in his hands in the court of the state, and he submits it to the court to say whether he is not bound to retain a sum sufficient to answer this demand?

§ 77. *A married woman's right in equity and at common law where a legacy is bequeathed to her.*

This defense makes it necessary to inquire into the right of the husband to a legacy bequeathed to his wife, and into the rights of the creditors of the hus-

band to such legacy. The common law of England identifies the wife so entirely with her husband, as scarcely to tolerate the idea of her separate existence while they live together. She cannot acquire personal property by a direct conveyance to herself. Her interest is, by act of law, almost in every instance, transferred to her husband, and becomes vested in him. But this rule does not apply to personal estate to which a female is entitled before marriage, and which has not been reduced to possession. This remains her property, and does not vest in the husband by the marriage. The marital right does not extend to the property while a *chose in action*, but enables the husband to reduce it to possession, and thereby acquire it. The property becomes his, not upon the marriage, but upon the fact of his obtaining possession.

The right of the legatee does not originate in the common law, and is not governed by the old rule, which disables the wife from taking for her own benefit. It is a right which cannot be asserted at common law, and can be sustained only in a court of equity. The personal estate of the testator vests in the executor for the payment of debts, who is a trustee for the legatee, after the primary trust for creditors shall be satisfied. As courts of equity grew up under the control of civilians, they have adopted the principles of the civil law, which views the rights of married women with much more liberality than the common law. Legacies, therefore, bequeathed to a married woman, have never been classed with conveyances at common law, but with *chooses in action*, and vest an equity in the wife herself, in which the husband participates, so far only as to assert her title in a court of equity. The property does not become his, nor is it subject to the liabilities which attach to that which is his, until it shall be reduced to possession. Till then, his creditors have no claim to it. If he dies, living the wife, before reducing it to possession, his power is not transmissible to his representatives, but dies with him. Since the claim of the creditor extends only to the property of the debtor, it cannot reach a legacy until it becomes his property.

§ 78. *Rights of a husband's creditors in equity to his wife's choses in action while yet not reduced to possession.*

It follows, then, not only because mere rights cannot be taken in execution without the aid of some special legislative provision, but because, also, there is no title in the husband to the thing itself, that a legacy not reduced to possession is not liable for his debts. Can a court of equity subject it to them? The books furnish no case in which this naked question has been brought before the court. This is, of itself, a strong, we think conclusive, argument against the right. That a creditor has never applied to a court of chancery to interpose in his favor and subject the *chooses in action*, or the equitable rights of the wife, to his claim against the husband, demonstrates the universality of the opinion that equity affords no aid in such a case. It is true, that the assignees of a bankrupt are permitted to assert this right. But it is equally true that they represent the bankrupt, as well as his creditors, and that all the marital rights of the husband are transferred to them. When they come into a court of equity, asserting a claim on the equitable interests of the wife, they exercise the marital right to reduce those interests to possession, not any pre-existing right of the creditors. In such a case, the court grants its aid on such conditions as its own rules prescribe, and will never permit the husband, or his assignees, to receive the property of the wife but on such terms, on making out of it for herself and children such provision, as, on a view of all the

circumstances of the case, may be deemed equitable. This uniform course of a court of equity would be incompatible with a previously existing right in the creditors. This rule has never been recognized, so far as we are informed, in the courts of Virginia, but it has never been denied, and we can conceive no principle on which it should be denied.

§ 79. *Wife's equity to a settlement favorably regarded.*

That those who ask equity should do equity is a fundamental rule of that court, which enters into, and mingles with, all its decisions; and that the property of a married woman should not be taken from her, without making some provision for her, is as equitable in Virginia as elsewhere. Our statute of distributions does not, we think, alter the case by making the husband a purchaser of equitable interests which may come to the wife during marriage. We can find no case in which a husband has been considered a purchaser of the equitable interests or *choses in action* of the wife, without some specific agreement by which he becomes so; and the act of assembly contains no declaration to that effect. It would be unreasonable to put this construction on it by implication, because the consideration supposed to be given by law for her estate remains in the power of the husband. The court of chancery will not enable a freeman of London to obtain the personal estate of his wife, without a settlement on her. Suits have been brought to assert the marital right of reducing her property into possession, but in no case that we have seen has her equitable right to a maintenance been doubted. Were this a suit by the husband and wife for her legacy, the court would certainly on the application, in England without such application, direct a reasonable provision for her maintenance.

§ 80. *Where husband relinquishes his right in his wife's legacy, his creditors cannot compel him to reduce it to possession for their benefit.*

As the case stands, the husband has relinquished his marital rights in this subject, and the question is, whether a court of equity will disregard or control this relinquishment in favor of creditors. As a general question, we can find no precedent for doing so. The husband has no interest in the legacy; he has only a power to make it his by reducing it to possession. Till this power is exercised, the property remains hers. We can find no case in which creditors have required the aid of the court to compel the husband to reduce it to possession, or in which a court has restrained the effect of a previous relinquishment of this marital right on the part of the husband. As a general proposition, we should consider this relinquishment valid against creditors; and if it is not so on the present occasion, its invalidity must be produced by the particular circumstances of the case.

§ 81. *Rule of equity applied to the facts here shown.*

What are those circumstances? In August, 1814, Henry Newman, the husband of the plaintiff, drew bills on Joseph Gallego, the testator, for \$2,000, and at the same time addressed a letter to him soliciting his acceptance of them, and promising repayment. These bills, with the letter of Mr. Newman, were presented to Mr. Gallego, in Baltimore, in June, 1815, who accepted them, and made arrangements for their payment in Richmond. He communicated the transaction to Mr. Poiton, his partner in this place, in a letter which contains this sentence: "Be so good as to debit Mr. Henry Newman, senior, to notes payable, for the sake of form, and that the amount may appear against him or his heirs, when I am no more, to be deducted out of the share coming to the

family." It also appears that this debt was charged to Newman on the books of the testator, and remained on his books till his death. His will was made in the year 1818.

Some objection was made to the admission of the letter from Mr. Gallego to Mr. Poiton, the plaintiff considering it as irrelevant, since parol and extrinsic testimony cannot affect the construction of a will. It is undoubtedly true that this letter cannot affect the construction of the will, nor does the court look into it with that view. If it has any bearing on the question under consideration it is on an entirely distinct part of it.

Although the legacy given to the wife does not become the property of the husband, unless reduced to possession, yet he has a right to reduce it to possession, and may demand the aid of a court of equity for that purpose, which aid will be furnished as of course, unless the court be restrained from affording it by considerations which are never disregarded. These considerations are extrinsic of the will, and depend on parol testimony. Such testimony must be admitted for this purpose. In cases where the husband does not voluntarily relinquish his claim to a legacy bequeathed to his wife, but asserts that claim in equity, if a distinct claim be also asserted for the wife, the court does not, as a matter of course, settle the whole on the wife as her separate property, but secures the whole or part of it to her, according to circumstances. Where, as in this case, the husband voluntarily relinquishes his marital rights, the court will undoubtedly sustain that relinquishment, unless it be made in fraud of the rights of others.

In this case there is reason to believe that the husband is insolvent, and that he has relinquished to his wife that she may receive and enjoy the legacy bequeathed to her, secured from his creditors. In this there is no injustice; his creditors trusted to his own resources for payment of their claims, and had no right to count on the fortune of Mr. Gallego. Creditors, generally, therefore, cannot compel him to reduce the legacy of his wife to possession for their benefit; but the application of this rule to a creditor, who is in rightful possession of the legacy, and has probably trusted the husband in the confidence that the means to secure repayment are in his own hands, is very much questioned. The relinquishment of the husband, and the consequent separate claim of the wife, may be considered as parts of the same transaction, and if the relinquishment was iniquitous, the claim, so far as it depends on that relinquishment, cannot be supported. If it was perfectly clear that the testator, at the time of making his will or at the time of his death, intended this advance to the husband to be set off against the legacy to the wife, the court would feel great difficulty in disappointing such intention. But this is not perfectly clear; the debt is due from Newman, the legacy is given to his wife. The debt, therefore, may still exist, and yet not be a set-off against the legacy. Had the money been advanced subsequent to the date of the will there would have been more reason for considering it as satisfaction in part for the legacy, but even then it would not necessarily be so considered. But this advance, being made anterior to the will, gives countenance to the opinion that the testator did not intend it as a deduction from the legacy. The will being subsequent, and to a different person, furnishes probability to the opinion that, if a provision for the debt had been in the mind of the testator, his will would have given some indication of his intention respecting it. It is also a consideration not to be disregarded, that the fund out of which this legacy is to be paid does not comprehend the debt due from Newman.

The circumstances of the parties, and, indeed, the two letters introduced into the cause, lead to the opinion that the testator made frequent advances to his relations, and that this particular advance might not be in his mind when his will was made.

The court does not perceive in the case any satisfactory evidence that equity ought to restrain the full operation of the instrument by which Henry Newman relinquishes his marital right in this legacy to his wife, and is, therefore, of opinion that it ought to be allowed its full effect.

BANK v. PARTEE.

(9 Otto, 325-334. 1878.)

APPEAL from U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—In July, 1866, the defendant Sarah D. Partee, wife of William B. Partee, then a resident of Mississippi, being indebted in the sum of \$125,000, and unable to pay the amount, submitted to her creditors a proposition in writing for settlement. She represented that the late war had caused her a loss of over \$300,000, leaving her indebted as mentioned, with no resources except lands, which would not then sell for half of their value, or for half of her indebtedness. In order, therefore, to place all her creditors on the same footing, some of them having brought suits for sums amounting to about \$14,000, she offered to pay one-half of her indebtedness in lands in Tallahatchie and Sunflower counties, Mississippi, at \$10 per acre; and, for the remaining half, to give her notes in equal sums, payable in January, 1867, 1868, 1869, 1870 and 1871, with interest at eight per cent. per annum, secured by a mortgage on the residue of her lands in Yazoo county, then under cultivation. This proposal was afterwards modified so as to postpone for one year the maturity of the several notes.

To secure confidence in the papers to be drawn to close the transaction, she selected gentlemen well known in Yazoo City to see to a proper execution of a deed of trust, and to act as trustees, or to select proper persons for that position. And she stated that Messrs. Hyams and Jonas, lawyers of high character in New Orleans, would attend to any of the business which the creditors might choose to place in their hands, and to the distribution of the new notes after they were executed. Accordingly, in November, 1866, a deed was executed by Mrs. Partee and her husband to one Robert Bowman, conveying to him the lands mentioned, upon the following trusts: 1st, to hold the lands in Tallahatchie and Sunflower counties for the benefit of such creditors as should accept the same at \$10 an acre in payment of one-half of her indebtedness to them, or if a majority of the creditors should desire it, to sell the same and divide the proceeds, or to convey to each of such creditors his proportion of the lands; and, 2d, in case of default in the payment at maturity of the notes executed upon the settlement, to sell the lands lying in Yazoo county, or so much as might be necessary to pay them, and apply the proceeds to their payment.

The deed contained a clause providing that if any of the creditors should fail within ninety days from its date "to signify in writing their acceptance of the terms of settlement and payment of their claims or debts," they should "be considered as refusing the same," and be debarred from the benefits of the deed. The instrument was properly executed, stamped and registered.

After its registration, it was delivered with the new notes, signed by Mrs. Partee and her husband, to Messrs. Hyams and Jonas, for the purpose of carrying out the proposed settlement and securing the acceptance of its terms. Many of the creditors had previously assented to its terms, and after the deed was executed they surrendered their old notes for the new notes. Other creditors came in afterwards, and in a similar way gave up their old notes and took the new paper. It does not appear, however, that any of them signified in writing their acceptance of the terms of the settlement within the ninety days mentioned in the deed.

It appears, also, that before the deed was executed, namely, in April, 1866, one James Stewart had brought suit against Mrs. Partee and her husband on a promissory note made by her, and in June following had obtained judgment by default against them for a sum exceeding \$6,000. Upon this judgment execution was issued, and in January, 1869, the lands in Yazoo county embraced by the trust deed were sold and purchased by Stewart and a son of Mrs. Partee. When the settlement was proposed, the existence of this judgment was concealed from Messrs. Hyams and Jonas, who acted, as already stated, for Mrs. Partee in securing the assent of creditors. The representation then made was that the lands were incumbered only by a small annuity.

The present suit is brought to set aside this judgment of Stewart, or to obtain leave to redeem the land sold under it; to remove the trustee, who is charged with certain fraudulent practices in connection with the trust property, and to have a new trustee appointed; and to enforce the trusts of the deed. It is unnecessary for the disposition of the present appeal to state in detail the various allegations of the bill or of the several answers of the defendants, as the case appears to have been decided upon the supposed impediment to the relief prayed by reason of the provision excluding creditors from the benefits of the deed, who failed, within ninety days from its date, to indicate in writing their acceptance of the terms of settlement, and by the sale of the property in Yazoo county under the judgment of Stewart. Our consideration is limited, therefore, to the effect of that provision upon the rights of the complainants, and to the validity of that judgment.

§ 82. *Compliance in substance with a deed of trust suffices.*

1. With reference to the provision, it is to be observed that it was not mentioned in the proposition for settlement made in July, 1866. That prescribed no period within which its terms should be accepted; and before the execution of the deed, as already stated, and as recited in it, many of the creditors had assented to them. To such creditors—and they embrace the complainants in this suit—the provision could not have been intended to apply. No purpose could have been subserved in requiring from them any further expression of assent to the settlement. As to them nothing further was necessary to complete the transaction than the surrender of the old notes and the acceptance of the new notes in their place; and this, as stated, was done.

§ 83. *A condition subsequent in the nature of a penalty prescribed by a deed may be waived by the grantor.*

As to the creditors who had not then acceded to the proposed settlement, it was important to fix some period within which they should come in. To quicken their action the provision was inserted. Their acceptance in writing was not a condition precedent to the vesting of the property in the trustee for their benefit, nor was it a condition upon which the trust was to be executed. It was at best only a condition subsequent in the nature of a penalty

against creditors not assenting in the prescribed way, and could be waived by the grantors, and was in fact waived by them. Long after the lapse of the period prescribed they expressed to their agents a hope that all the creditors would come in; and they authorized them to receive from creditors their old notes and to deliver in exchange new notes in their place for one-half of their amount; and when this was done they permitted the creditors to repose upon the new security furnished until the statute of limitations had barred a right of action upon the old notes, without any suggestion that the deed was inoperative because of their failure to accept in writing the terms of the proposed settlement within ninety days. Their approval of, or at least acquiescence in, the conduct of their agents estops them in equity from enforcing the provision as to the acceptance in writing, so as to debar from the benefits of the deed any of the creditors who accepted the settlement by surrendering the old notes and taking the new ones. A married woman cannot be permitted, any more than an unmarried one, to retain the benefits of a transaction which she has solicited, and at the same time to disavow it. She cannot in this case retain the surrendered notes and repudiate the consideration upon which their surrender was made. 2 Story, Eq., sec. 1536.

§ 84. *Under the law of Mississippi a personal judgment against a married woman is void.*

2. As to the Stewart judgment, it is to be observed that the record shows it was rendered in an ordinary action of *assumpsit* upon a promissory note of Mrs. Partee, without mention in the pleadings of any separate property belonging to her, or, indeed, of her being a married woman. The plaintiff Stewart knew that she was not a *feme sole*, and therefore neither he nor her son, who were the purchasers under the judgment, can claim any advantage from the omission. The judgment is simply a personal one; and a judgment of that character against a married woman is a nullity under the laws of Mississippi.

§ 85. *Common law as to contracts by married women stated.*

At common law a married woman is incapable, except in a few special cases, of contracting a personal obligation. Her disability in this respect by reason of her coverture cannot be overcome by any form of acknowledgment or mode of execution, or by her uniting with her husband in the contract. The special cases in which the disability does not exist are those where she is compelled from necessity to act as a *feme sole*, as when her husband is imprisoned for life or for years, or has fled the country or been exiled. In such cases the husband is considered as civilly dead, and the wife as in a state of widowhood. Her disability also ceases when she is permitted to act as a sole trader, as in England by the custom of London; and in this country by special legislation. Equity, too, will sometimes impose as a charge upon her separate estate a debt incurred by her for its benefit, or for her benefit on its credit; but this is a different matter from a contract by which a personal obligation is created. Except in the cases mentioned, the general rule is that she cannot be personally bound; nor can she be subjected on her contract to a personal judgment. Various reasons are assigned for this latter exemption, some of which would be destitute of force under our altered laws. Reeves, in his treatise on Baron and Feme, says, "that no action at law can be maintained against her, for the judgment in that case would subject her person to imprisonment, and thus the husband's right to the person of his wife would be infringed, which the law will not permit in any case of a civil concern." "And for the same

reason," he adds, "there can be no personal decree against her in chancery. It must be one which reaches her property only." p. 171. This doctrine, whatever reasons may be assigned for it, has, with few exceptions, been recognized in the several states; and, in many instances, personal judgments against married women upon their contracts, rendered upon defaults or by confession, have been held void. *Griffith v. Clark*, 18 Ind., 457; *Morse v. Toppan*, 3 Gray (Mass.), 411; *Dorrance v. Scott*, 3 Whart., 309. See, also, *Wallace v. Rippon* 2 Bay (S. C.), 112, and *Norton v. Meader*, 4 Saw., 620-624.

§ 86. — *this doctrine as affected by legislation in Mississippi.*

The doctrine of the common law has, however, been greatly modified in most of the states by legislation, and the extent to which a married woman may contract, and the manner in which her contracts shall be authenticated and enforced, are definitely prescribed. In Mississippi such modification has been made. The code of 1857 enacted that the property owned by a woman at the time of her marriage, or which shall subsequently come to her, shall be her separate property, and not be subject to the debts of her husband, but shall be liable for her own debts contracted before marriage. At the same time it authorized a married woman, either by herself or conjointly with her husband, to contract with reference to her separate property, for its lease, use and improvement, and the construction of buildings upon it; also, for the support of herself and children, and for many other things; and provided that such contracts shall be binding on her, and that satisfaction for them may be had out of her separate property. It also declared that, in addition to the remedies then existing by the common law by and against married women, "the husband and wife may sue jointly, or, if the husband will not join her, she may sue alone for the recovery of her property or rights, and she may be sued jointly with her husband on all contracts or other matters for which her individual property is liable; and if the same be against husband and wife, no judgment shall be rendered against her unless the liability of her separate property be first established." Code of 1857, p. 335.

In several cases which have arisen under these provisions, it has been held by the supreme court of Mississippi that unless a married woman has a separate estate she is subject, as to her contracts, to the disability of coverture, and that a creditor suing her must, in his bill in equity or declaration at law, aver that she has such an estate, and that the debt is a charge upon it or ought to be paid out of it. It was so held in *Choppin v. Harmon*, decided in 1872, when the court added that every suit in the state, whether in law or in equity, founded upon her contracts, "takes the shape and direction of reaching a specific fund." 46 Miss., 307. And in *Bank of Louisiana v. Williams*, 46 id., 629, decided in the same year, the court said, speaking of a suit against a married woman, "The condition precedent to a right of recovery, either at law or in equity, is that there be a separate estate out of which satisfaction may be had. Our jurisprudence does not realize the possibility of a personal judgment against a married woman." In *Casey v. Dixon*, 51 id., 593, decided in 1875, a personal judgment was rendered against a married woman and her husband, and her land sold under execution issued upon the judgment. The purchaser at the sale brought ejectment for the premises. It was held that the judgment was void and the sale under it invalid; the court saying, citing language used in a previous case not then reported, that in order to authorize a judgment against a married woman, her liability must be shown by averment and established by evidence; that a married woman is incapable of being

bound either by contract or judgment, except in the special cases authorized by law; and that by the code of the state, if the suit is against her and her husband, no judgment can be rendered against her, "unless the liability of her separate property be first established."

In *Mallet v. Parham*, 52 id., 921, also decided in 1875, the court, speaking of the power of a married woman to contract for supplies for her plantation, said: "It is only in consequence of the existence of her separate estate that the statute authorizes her to make the contract, and that the separate estate alone is bound by the contract. The enforcement of the contract is in the nature of a proceeding *in rem*. No general judgment can be rendered against her so as to reach on execution any other property."

§ 87. *In case of a void judgment, where the judgment creditor is the purchaser, there can be no question of innocent purchaser.*

There are other adjudications of the supreme court of Mississippi to the same purport. Those cited are sufficient to establish the invalidity of the *Stewart* judgment. The allegation essential under those decisions in every suit against a married woman, that she has separate property which is liable for the debts alleged, is wanting in its record. That discloses no ground of action upon which a personal judgment can be rendered against her under the law of the state. The coverture of Mrs. Partee at the time the judgment was rendered is averred in the bill and is admitted. That fact going to the jurisdiction of the court could be shown by competent proof. There was no question of innocent purchasers without notice in the case, the judgment creditor and the son of Mrs. Partee being the purchasers.

The decree of the court below must be reversed, and the cause remanded for further proceedings; and it is so ordered.

Dissenting opinion by MR. JUSTICE MILLER.

I dissent from the judgment of the court in this case, and especially from that part of the opinion which holds that the judgment against Mrs. Partee and her husband, under which the land in question was sold, was absolutely void.

§ 88. *A judgment against a married woman in Mississippi, rendered against her and her husband on a note signed by both, cannot be declared void in a collateral proceeding by third persons.*

It is to be remembered that the question is not whether such a judgment would be held erroneous on an appeal from that judgment, but whether it can be held absolutely void when assailed collaterally in another action, where it is relied upon as the foundation of a title based on a sale under execution issued on the judgment.

Mrs. Partee was sued jointly with her husband. Both by the common law and by the law of all the states, a married woman could sue or be sued by joining her husband with her. The statutes of Mississippi, where this judgment was rendered, largely increased the liability of married women to be sued beyond what it was at common law. It made her liable, out of her separate estate, for supplies to the farm owned or cultivated by her, for any debt contracted with reference to her own property, whether the contract was made with the consent of her husband or not. In the case in which the judgment is held void, she signed a joint note with her husband, her name being signed before his; and she was sued with him on that note, and personally served with process. She has never denied the validity of that judgment, or sought

to set it aside or vacate its force. Other persons, not parties to that suit, now come into court and say that all that was done was void because it does not appear affirmatively, by the record, that the note on which the suit was brought was a contract concerning her private property. That was a matter which, if it were true, should have been pleaded as a defense. She was subject personally to the jurisdiction of the court. Her contracts were subjects of which the court had jurisdiction. It had jurisdiction to enforce those contracts by sale of her individual property. The note on which she was sued had every indication that it was her individual contract, as it no doubt was, and that her husband's name was placed there to show his consent.

To hold that persons not interested in that contract, nor parties to the suit, can now come in and treat the judgment as absolutely void, on its face, is such a departure from all the principles on which the jurisdiction of the court is determined, that even the authority of the courts of Mississippi should not, in my opinion, control us in the matter.

GRIDLEY v. WYNANT.

(23 Howard, 500-503. 1859.)

APPEAL from U. S. District Court, District of Iowa.

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.—The appellee filed this bill to enjoin the appellants from prosecuting a suit to recover a parcel of land in his possession and to quiet his title against their claim as heirs at law of Sarah A. Blakely, deceased. He charges in his bill that he purchased the land from William B. Beebe, and paid to him the purchase money, and that Mrs. Blakely made him a deed at the request of Beebe, who was her son-in-law, and for whose use and benefit it had been conveyed to her, with her consent. At the time of her conveyance she was a married woman, and the bill avers that, by error, ignorance or oversight, her husband failed to join in her deed.

The defendants admit that they claim as heirs at law of Mrs. Blakely, and insist that she was under a disability to convey land without the consent of her husband. They deny that she held the land in trust for Beebe, but insist that, even if that were the case, the trust was illegal, for that Beebe was an insolvent debtor, and the sole design of such a conveyance was to defraud and delay his creditors.

They object that Beebe is a necessary party in the cause. The district court granted relief according to the prayer of the bill. The testimony sufficiently establishes the case made by the bill. It appears that Beebe purchased the land from the tenants in fee-simple, and that it was conveyed to Mrs. Blakely by his directions, and that this was done because he was in debt, and did not desire the exposure of his property. That he sold the land to the appellee, and that Mrs. Blakely executed to him titles without joining her husband in the conveyance.

§ 89. *A married woman may be a trustee, and may convey the trust property without her husband joining.*

The question arises, whether the heirs at law of Mrs. Blakely can contest the validity of her conveyance. There is no incapacity in a married woman to become a trustee, and to exercise the legal judgment and discretion belonging to that character. A trustee in equity is regarded in the light of an instrument or agent for the *cestui que trust*, and the authority confided to him is

in the nature of a power. It has long been settled that a married woman may execute a power without the co-operation of her husband. Sug. on Pow., 181. Some doubt has been expressed whether, at law, a married woman could convey an estate vested in her in trust, and inconveniences have been suggested as arising from her asserted incapacity to make assurances which a court of law would recognize as valid. And it has been determined that she could not defeat a right of her husband or impose a legal responsibility upon him by her unassisted act. Lewen on Trusts and Trustees, pp. 89, 90; Sug. on Pow., 192, 196; 2 Spence, Eq., 31. But within the scope of her authority a court of equity will sustain her acts, and require those whose co-operation is necessary to confirm them. In the present instance her deed was within the scope of her authority and duty. She did not defeat an estate to which her husband was equitably entitled, nor does he claim adversely to it. The complainants are her own children, her heirs at law, who are seeking to divest of his estate a *bona fide* purchaser, and to acquire one for themselves — one to which their mother had no claim in equity or good conscience.

§ 90. *A bona fide purchaser from a trustee cannot be affected by any fraud in the creation of such trust.*

Nor can the appellants avail themselves of the illegality of the consideration on which their mother became the trustee for Beebe. The trust has not only been constituted, but carried into execution. The appellee is not a mere volunteer seeking to enforce its terms, nor does his equity depend upon the validity of the trust for its support. He has an independent equity, arising from his purchase from persons professing to hold a legal relation to each other and to the subject of the contract, and to enforce his right there is no need for any inquiry into the consideration or motives that operated upon these parties to assume their relation of trustee and *cestui que trust*. In such a case equity does not refuse to lend its assistance. *McBlair v. Gibbes*, 17 How., 232 (CONTRACTS, §§ 457-58).

The objection that Beebe is a necessary party to the bill cannot be supported. Beebe has not claimed adversely to the title of the appellee. The legal title has never been invested in him, nor do the appellants recognize any privity or connection with him. They claim the property discharged of any equity, either in his favor or that of the appellee. Upon the whole case, the opinion of the court is in favor of the appellee, and the decree of the district court is affirmed.

GRIDLEY v. WESTBROOK.

(28 Howard, 503-505. 1859.)

APPEAL from U. S. District Court, District of Iowa.

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.—This suit was commenced in the district court of Jackson county, Iowa, by the appellees, under articles 2025 and 2026 of the code of Iowa, to quiet their title and possession to certain lands in that county against the impending and adverse claim of the appellants, the heirs at law of Sarah A. Blakely, deceased.

The appellants appeared, and answered the petition, and procured the removal of the cause to the district court of the United States for Iowa, under the twelfth section of the judiciary act of September, 1789. After the removal of the suit to the district court, the appellants commenced a cross-suit, asserting

therein their own title to the land in controversy, and praying for a decree of delivery of the possession to them, and an account of the mesne profits. The original and cross-suits were "consolidated" on the motion of the appellants, and were heard as one suit.

The proceedings in these causes seem to have been framed upon the course of practice prevailing under the code of Iowa; and we have found some difficulty in entertaining the suit, as not conforming to the mode of proceeding prescribed for courts of the United States in chancery proceedings; but as we are enabled to ascertain, from the pleadings and proofs, the matter in dispute between the parties, we shall proceed to adjudicate the questions they present.

§ 91. *A married woman holding property as trustee may execute a valid conveyance thereof through an attorney in fact.*

The facts disclosed by the proofs show that William B. Beebe, an insolvent debtor, in order to carry on business without interruption, made purchases and sales of property on his own account, in Iowa, but under the shelter of the name of Sarah A. Blakely, the mother of his wife, a resident of Missouri. To enable him to do so with facility, he procured from her powers of attorney, which conferred authority for that purpose.

The land described in the petition was purchased by Beebe with his own money, and the titles were made for his use to Mrs. Blakely. Subsequently he sold them to one of the parties to the cross-suit (Mrs. Wells) for a valuable consideration, and, as attorney in fact for Mrs. Blakely, executed to her a deed; and the appellees, Westbrook and Gauger, claim as purchasers from this person. At the time of the execution of the deed of Mrs. Blakely, and of her death, she was a *feme covert*. The appellants insist that the conveyance to Mrs. Wells in the name of Mrs. Blakely is void, and that they are entitled to hold the lands as heirs at law.

We discover no material variation between the principles applicable in this cause and that of the same appellants and Wynant, which we have just decided. Upon the authority of that case we determine that the decree of the district court must be affirmed.

BAYERQUE v. HALEY.

(Circuit Court for California: McAllister, 97-108. 1856.)

~~DEMURRER~~ to bill filed to foreclose a mortgage.

§ 92. *An averment of citizenship equivalent to a direct affirmation.*

Opinion by McALLISTER, J.

The first ground taken in support of the *demurrer* is, that the averment of the citizenship of Samuel Moss, Jr., is not sufficiently made to give jurisdiction to the court. It is in these words: "That the said Samuel Moss, Jr., during his life-time was a citizen of the United States and of the state of Pennsylvania." Although this averment might have been made with more precision, it still must be deemed sufficient. If during his life he was a citizen of Pennsylvania, the idea that he was a citizen of this state at the time of the commencement of this suit is excluded. The averment is equivalent in import to an averment of citizenship in Pennsylvania in more direct terms. In the case of *Gassies v. Ballou*, 6 Pet., 761 (Courts, § 1090), the defendant was represented as "now residing in the parish of West Baton Rouge, where he caused himself to be naturalized an American citizen." On the ground that such description was of equivalent import to a more direct and precise averment,

the description was held sufficient. At all events this case cannot be permitted to go off on that ground, for if decided against the plaintiff he would be permitted to amend *instantly*.

§ 93. *Assignment of mortgage and note by attorney of a married woman. Statement of facts on this point.*

The second ground of demurrer is the principal point. It is, "that it appears by the bill that the complainant derives title to the note and mortgage set forth by virtue of a certain instrument of assignment executed by one Zoe Mouroult and her husband, one P. L. Lefevre, by one Lucien Hermann, their attorney in fact duly constituted, when in law the said Zoe Mouroult, being a married woman, has no power to constitute an attorney, either with or without her husband, for that purpose, and that no title or right can be derived through such an assignment, and therefore complainant is not entitled to the relief prayed for."

The transaction to which the assignment refers claims attention. To secure the payment of certain moneys advanced by Zoe Mouroult, the wife of Pierre J. Lefevre, the defendants, Haley and Thompson, in consideration of the sums of money received by them, on the 14th day of January, 1854, made and delivered their joint and several promissory note for the sum of \$12,000, payable to the order of the said Zoe, the wife of the said Pierre L. Lefevre, in the sums and at the times mentioned in said note. To secure payment of the same defendants at the same time executed and delivered a deed of mortgage to the said Zoe, her heirs and assigns. Subsequently, the said mortgagee and her husband, the said Pierre L. Lefevre, by their attorney, the said Lucien Hermann, for value received, assigned, sold and transferred the said note and mortgage deed to one Samuel Moss, Jr., from whom the plaintiff directly claims.

§ 94. *California legislation considered, as to the wife's right to assign by attorney.*

Now, it is urged that no interest passed to Moss, because Zoe Mouroult, being *feme covert*, could not make a valid power of attorney to Hermann. To sustain this proposition reliance is placed upon the act of the legislature of this state, passed April 17, 1850, entitled "An act defining the rights of husband and wife." In relation to this statute, the supreme court of this state have said: "We have repeatedly held that our statute does not change the relation of husband and wife, except in the particular cases expressly provided for by the statute." *Rowe v. Kohle*, 4 Cal., 285. Various provisions are made by the act of the legislature as to what shall constitute the separate property of the married woman, and what steps shall be taken to protect it. But for the purposes of this case it is only necessary to refer to the fifteenth section of the act. It extends the provisions of the law to persons who were married out of this state, and who had never resided within it. Upon the principle that *expressio unius est exclusio alterius*, it is evident that the clear intent of the act was to exclude from its operation persons who were married without the limits of the state and never lived within them. It was eminently proper to exclude those who were married without, and never came within, the jurisdiction of the state. The facts of this case show that Zoe Mouroult was not wedded to her husband in this state, that neither of them resided in this state at the time of the execution of said note and mortgage deed, nor has either of them at any time resided therein, but both of them have always been aliens and citizens of the empire of France. This case cannot, therefore, be brought within the

operation of the act of the legislature on which reliance has been placed by the counsel for the demurrer. The court has been also referred to the second, nineteenth, twenty-first, twenty-second and twenty-third sections of the act of the legislature of April 16, 1850, entitled "An act concerning conveyances." The second section prescribes the mode by which husband and wife by their joint deed may convey the real estate of the wife; and the remaining sections cited all refer to the mode of such conveyance. Whether all these sections have not been repealed, it is unnecessary now to decide. It is sufficient to say that all the sections of the law which relate to married women are confined to real estate exclusively.

§ 95. *Common law rule that the deed of a married woman is void is here inapplicable. A mortgage until foreclosure is, like a note it secures, assignable by husband alone.*

But it has been urged for this demurrer that, independently of all statutory enactments, at common law a married woman could make no deed, and her act was deemed a nullity. It is true that a married woman could by that law make no conveyance of real estate except by fine, or common recovery, or some equivalent act of record. The proceeding by fine or common recovery never prevailed in this country. A common law grew up, which became a rule of property, by which a joint conveyance by husband and wife was held to pass the property conveyed. Then came statutory enactments in different states, providing for the security of married women by requiring from them examinations and acknowledgments separate and apart, when they joined in conveyance with their husbands. Such is the law in the different states. But in the view the court takes of this case, the doctrine that at common law the deed of a *feme covert* is void, does not touch it. The bill is filed to foreclose a mortgage to recover the payment of the note. Until foreclosed, the mortgage, as well as the note, is a mere chose in action; and the indorsement of the note and assignment of the mortgage by the husband alone, and his delivery, would be sufficient to transfer the interest without the signature of the wife. A debt was due to the wife, a chose in action,—*debitum in presenti, solvendum in futuro*. A *bona fide* assignment for valuable consideration of this debt by the husband divests in a court of equity the interest of the wife.

In the case of *Cassell v. Carroll*, 11 Wheat., 134, an agreement was entered into by certain parties; and among them was John Browning, the husband of Louisa Browning, and the committee of Louisa Browning, wife of John Browning, she being at the time a lunatic. By the agreement, certain quit-rents belonging to the wife were to be surrendered. It was contended that John Browning, the husband, as such, could not convey the title to these rents belonging to his wife, so as to bar her, in case of survivorship, from the right of recovery; and she being a lunatic, no act done by her committee could affect her. In relation to these rents, the court say: "They were not future, contingent or reversionary interests vested in her. How far, in respect to such interests, the husband or the committee of a lunatic is by law authorized, by a conveyance or assignment, to dispose of her rights, is a question which we are not called upon to decide, and upon which we give no opinion. The case here is of choses in action actually due to the wife. . . . It does not appear to us that it has ever yet been decided that a *bona fide* assignment for a valuable consideration, made by a husband to a third person, of a debt actually and presently due to his wife, does not divest, in equity, the title of the wife." 11 Wheat., 151.

§ 96. *Husband may, for a valuable consideration, assign wife's choses in action, and equity will sustain him.*

By the terms of the mortgage deed in this case, it is provided that the whole amount of principal shall be deemed due, in case failure be made in the payment of any part of the interest as it shall grow due. The absolute sale, *bona fide*, of such a chose in action by the husband, amounts to a reduction of it into his possession. He has a qualified interest in the choses in action of his wife, as well as in her real chattels; but if he do not reduce them into possession during life, they survive to her. The difference between the two is, the chattels real are assignable at law; the choses in action, with the exception of bills of exchange and promissory notes, are assignable for valuable consideration, and the transfer will be sustained in equity. Clancy's Rights of Married Women, 109, 110. The husband may bar the right of survivorship in the choses in action by a release. Thus he may release any wrong done or promise made to her alone, or to her and himself during marriage. He may discharge his wife's bond, as also not only the debt actually due, but even that which is not payable till a future day. So he may release any right or duty that may possibly accrue during marriage. Again, if the husband reduce his wife's choses in action into possession, her right is barred. And there are various acts of his, falling short of a reduction into possession, which are deemed equivalent to it; as if a husband alone, or with his wife, authorized a third person to receive her chose in action, who accordingly receives, the right of the wife is barred although the avails never reach the husband. Clancy, 111, 112. And where, on a bond executed to the wife, the husband gave a letter of attorney to another to receive, and who did receive it, the wife died, and then the husband deceased,—*held*, the action was properly brought by the executor of the husband. *Ibid*.

In the case of *Bates v. Dandy*, 2 Atk., 207, where the husband was entitled, in right of his wife, to two mortgages, borrowed a sum of money from A., and agreed in writing that he had left them with plaintiff, and that he would assign them to him forthwith, the husband died before making the assignment. On a bill to foreclose the mortgages, it was insisted on the part of the wife that they were choses in action, and that, not having been assigned by her husband, they survived to her. Lord Hardwicke held that the husband, being entitled to the trust of these mortgages, had the power to assign them for his own use, and that leaving them with the plaintiff, and promising that he would procure them to be assigned, amounted to a disposal of them for so much as to satisfy plaintiff's demand, but no more; for, although he might have disposed of the whole in the manner he did, his intention was only to secure the plaintiff's debt, which being done, they belong to the widow as her choses in action. Clancy, 121.

The correct rule deducible from the authorities is, that where the assignment by the husband is voluntary, without consideration, it will not bind her right should she survive him; but where the transfer is for a valuable consideration, the purchaser takes the interest assigned discharged from the wife's right of survivorship.

§ 97. *Bills of exchange and promissory notes may be indorsed over by the husband by way of transferring the wife's interest.*

Again, we have seen that bills of exchange and promissory notes constitute an exception to the rule; that choses in action of the wife, other than chattels real, are assignable only in equity. Now, in this case, the note having

been made payable to a married woman, the indorsement by the husband would effect a legal transfer, inasmuch as the note became his property. *Shutleworth v. Noyes*, 8 Mass., 229. As the joining of the wife was not indispensable to transfer the interest, it is useless to discuss the right of a married woman to execute a deed or other instrument under seal. The *demurrer* must be overruled.

BEIN v. HEATH.

(6 Howard, 228-248. 1847.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is an appeal from the circuit court for the eastern district of Louisiana. The bill was filed by the appellants, Bein and wife, to enjoin proceedings under a writ of seizure and sale taken out by the appellee, Mary Heath, to sell certain property of the appellant, Mary Bein, under a mortgage from the latter, dated 8th of May, 1838, to secure two notes drawn by her in favor of her husband, and by him indorsed,—the one for \$10,711.71, the other for \$535.50. These notes, the complainants allege, were given for a loan obtained by Richard Bein, the husband, for his own use, and which was so applied; and that in such a case, by the laws of Louisiana, the mortgage of the wife, and her promise to pay the debt, or to make her property responsible, is not binding, but void. The answer of the appellee denies the averment of the bill as to the purpose of the loan or the use of the money.

It is objected that, the suit being brought in the name of the husband and wife, it must be considered the suit of the husband, and that a decree would not bind the wife.

On looking into the bill it appears that the name of the husband is used only as the *prochein ami* of his wife. He asks no relief. The wife prays an injunction against the sale of the mortgaged property, and a rescission of the mortgage and notes, and a release from all liability thereon. The bill was sworn to by the wife, and a rule was entered on the attorneys of the defendant to show cause why the injunction should not be granted in favor of Mary Bein, and at a subsequent day the writ was granted. An injunction bond was given by the wife, with security, the name of the husband being used only as authorizing the wife to execute the bond. And so throughout the proceedings the wife is treated as the party in interest, the name of the husband being formally used.

§ 98. *The husband is the proper person to join the wife in her suit against another.*

Where the wife complains of the husband, and asks relief against him, she must use the name of some other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. This is a matter of practice within the discretion of the court. It is sanctioned in the sixty-third section of Story's Equity Pleadings, and by Fonblanque. The modern practice in England has adopted a different course, by writing the name of the wife with a person other than her husband, in certain cases. From the frame of the bill no doubt is entertained that the decree will bind the wife.

Prior to the marriage of Bein and wife they entered into a marriage contract, in which it was stipulated that neither should be liable for the debts of the other; and each reserved the right of selling and disposing of their prop-

erty, after marriage, as they might deem proper, with the consent of the other. The wife brought into the marriage, and settled upon herself, as stated, property, real and personal, estimated to be worth \$88,635. This contract was entered into in accordance with the Louisiana law.

The loan was negotiated on the 8th of May, 1838, at which time it is proved that Richard Bein was known to be much embarrassed, and, as it appears in proof subsequently, was actually insolvent. In the act of mortgage, Mrs. Bein declared that she was justly indebted unto Sherman Heath in the full sum of \$10,711.71, being a loan of money made to her, and for her sole benefit, etc. This act had all the sanctions required by law. On the 10th of the same month a check, payable to Mrs. Mary Bein or order, for the above sum, was drawn by S. Heath & Co. on "The Citizens' Bank of Louisiana," and handed to Mrs. Bein.

It appears that Heath had knowledge of the embarrassments of Bein, and consulted with J. W. Smith, a lawyer, who is a witness, how the loan could be legally made. He was informed that it must be made for the sole benefit and use of the wife, and that the husband should not be interested in or benefited by it. Heath stated that the money belonged to his mother, and he did not wish to receive more than the legal interest for fear of difficulty; and that he had rather loan the money to Mrs. Bein, believing it to be safe, than to let other persons have it at higher rates. Afterwards, Heath and Bein being present, the witness stated to them that the loan would not be legal unless it was for Mrs. Bein's sole use and benefit; "that no loan could be made legally to him under cover of a loan to his wife, and that it must be a *bona fide* contract with Mrs. Bein." Bein then, in the most positive manner, informed Heath that the proposed loan was a real *bona fide* loan to Mrs. Bein; that there was no cover or concealment about it. Witness examined the act of mortgage, and filled up the check, and handed it to the notary.

For nearly five years Mrs. Bein paid the interest on the loan, kept the property insured, and assigned the policy annually. On the 2d of April, 1840, Richard Bein filed his petition for the benefit of the insolvent act, attached to which was a schedule of his debts; and, among others, a debt due to his wife, for the same amount above loaned to her. It appears that Bein paid several debts of large amounts shortly after the loan was negotiated, but, independently of his own statements, there is no positive evidence that these payments were made with the money loaned.

§ 99. *Under Louisiana code a mortgage given by the wife for a loan to the husband, or to the wife covertly for him, is void.*

The article 2412 of the Civil Code of Louisiana declares: "The wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage." Under this law, a mortgage given by the wife to secure a loan made to the husband, or to the wife covertly for his use, is void. As the loan in question was made to the wife, which appears from the mortgage and the check for the money, a question in the case is, whether these forms were adopted to charge the wife, in fraud of the law, for the benefit of the husband. No fraud or mistake is alleged in the bill. The complainant states that the loan was made by her husband for his benefit, that she became his surety in violation of the law of Louisiana, and was induced, contrary to her wish, to mortgage her property for the payment of the money. On these grounds the court are asked to declare the mortgage void.

§ 100. *As a rule, a feme covert cannot avoid her conveyance of her property, made with the due forms of law, except by alleging and showing mistake or fraud.*

If this bill be sustainable, it must be on the peculiar provisions of the Louisiana law. In ordinary cases, it would be demurrable. Where a *feme covert*, by the forms of law, has conveyed her property, she can avoid the effect of such conveyance only by showing mistake or fraud. And this must be alleged in the bill. On ordinary principles an individual is estopped from denying a fact which he has admitted in a sealed instrument.

§ 101. *Where money is loaned to the wife in good faith, the fact that it is afterwards used to pay her husband's debts does not avoid her mortgage made to secure it.*

In making the loan Heath acted with great caution. He was agent for his mother. He proceeded under legal advice, and consummated the agreement in the presence of his counsel. Bein was known to be irresponsible; consequently Heath did not rely upon him for payment. The acts of Heath in negotiating the contract, and the account he gave of it, all show that he acted in good faith, and in full confidence that the loan was made to Mrs. Bein. The mortgage was executed by her, under the most solemn declaration, "that the money was borrowed for her benefit,"—her attention being specially directed to the clause of the mortgage which so declares, as appears from a marginal note,—sanctioned by the notary, and signed also by other persons. And the check for the money was paid to the mortgagor.

From these facts it is clear that Heath is not chargeable with collusion. And there is nothing on the face of the contract to excite suspicion. On such a transaction the mortgagee may well stand and claim the benefit of the security until it shall be impeached by the mortgagor. This is attempted to be done, not by proof of fraud or mistake, but on the ground that the loan did inure to the benefit of the husband, and not to the benefit of the wife. This is a matter subsequent to the contract, and involves the inquiry, whether the person making a loan, with the utmost fairness and caution, to the wife, must, to charge her, see that the money is applied to her use.

The article which declares that the wife cannot become the surety of her husband does not superadd the above important condition as to the application of the money. It is not in the law, unless it shall have been put there by judicial legislation. The fact that the money borrowed was paid to the husband, or was used for his benefit, as a matter of evidence, may be proved to show the character of the transaction. And, connected with other facts, it may conduce to establish collusion or fraud. But to treat this supposed requisite as a matter of law, under the above article, would violate every known rule of construction. With this general remark, we will examine the Louisiana decisions on this point.

The case of *Brandegge v. Kerr*, 7 Martin (N. S.), 64, in facts and principle is said to be similar to the one under consideration. That was an "action on the note of the wife indorsed by the husband, alleged to have been received from the wife on a loan made to her by a check delivered to her." And the court say, "that the circumstance of the wife having a separate advantage in the contract, being of the essence of her obligation, must be proven by some other evidence than proof of her having touched the money." And in conclusion they say: "Being of opinion that there is no fact in evidence from which it is possible to infer that the plaintiff's money was employed for the separate use of the wife," etc., "we conclude that the wife is not bound." The court also

say: "We cannot distinguish this paper from a note joint and several of husband and wife, for they are bound jointly and severally, and the plaintiff has prayed for a judgment joint and several."

It must be admitted that the court, in the above case, consider proof of the application of the money to the use of the wife as essential to bind her. And unless that case, in its facts or the law under which it was decided, shall be shown to differ from the facts and law of the case under consideration, it will constitute a rule of decision in this case.

If this action were on the notes given by Mrs. Bein and indorsed by her husband, in that respect, and also in the payment of the money to the wife, the cases would be similar. But in the case before us the action is on the mortgage, in which there is no liability of the husband, and no decree is asked against him. It is true, notes were given similar to that given in the case cited, but the notes of Mrs. Bein, though indorsed by her husband, must be considered as connected with the mortgage, which explains the nature of the transaction. And in addition to this, there is evidence that the contract was made with Mrs. Bein, under the strongest assurance that the loan was made for her sole benefit, and under a full conviction by Heath that it was so made. In these important particulars there is a difference between the cases. The case cited seems to have rested on the face of the note and the check.

But still the ground as to the application of the money remains unanswered. In the above decision, the case of *Darnford v. Gros*, 7 Martin, 465, is cited, and it is the only authority referred to in the opinion of the court. The decision in that case was founded on the sixty-first law of Toro. It is cited by the court as follows: "From henceforward, it shall not be lawful for the wife to bind herself as security for her husband, although it should be alleged that the debt was converted to her benefit; and we do also order, that when the husband and wife shall obligate themselves jointly in one contract, or severally, the wife shall not be bound in anything, unless it shall be proved that the debt was converted to her benefit, and she shall then be bound in proportion to what shall have been so applied." "But if the debt so applied to her use served only to procure that which her husband was obliged to supply her with, such as food, clothing and other necessities, then we say that she shall not be bound in anything."

The above action was founded on a promissory note subscribed by the wife conjointly with her husband. And the court say, "that the restriction imposed by the Spanish laws on the obligations contracted by the wife jointly with her husband has not ceased to be in force, and that, according to it, when the creditor wishes to compel her to the performance of such an obligation, he must prove that the debt was converted to her benefit."

The law of Toro was repealed, with all other Roman, Spanish and French laws in Louisiana, in every case provided for in the Civil Code by article 3521. The Civil Code was adopted in 1825. But as the case first cited, of *Brandegge v. Kerr and Wife*, was decided in 1828, after the repeal of the law of Toro, it is contended that the decision could not have been governed by that law. But it seems, from the statement of one of the counsel, that the contract was made under that law. The reference to the case of *Darnford v. Gros* shows, as above stated, that the decision against *Kerr and wife* was made under the law of Toro. This appears clearly from the language of the court.

Great reliance is placed on the case of *The Fireman's Company v. Cross*, 4 Rob. (La.), 509. That action was instituted on a promissory note for \$7,000,

drawn by the defendant, and secured by mortgage on her paraphernal property. It was proved "that no portion of the money loaned was ever paid to the defendant, but that it was paid by the plaintiffs to different persons on orders given by the husband." The facts in that case show that the wife was the surety of the husband. And the court very properly held that such proof was admissible, although in the mortgage the wife stated the loan was made to her. Article 2256 declares "that parol evidence shall not be admitted against or beyond what is contained in the acts," etc. But this was held not to apply to contracts made *in fraudem legis*.

In their opinion the court say: "We are satisfied that the money borrowed was intended for, and was applied to the use of, the defendant's husband." "This case," they observe, "is much stronger than that of *Brandegee v. Kerr and Wife*, in which it appeared that the wife had actually received the money, but there was no proof of its having turned to her separate advantage." The citation of the case against Kerr and wife is a seeming sanction of the ground on which that case was decided. But the case before the court did not turn upon the application of the loan, as it was clear that the husband received the money, and applied it, by orders on the plaintiffs, to the payment of his own debts. This shows the intent with which the loan was made, and also that the facts were known to the plaintiffs. The reference seems to have been made to the case of Kerr and wife generally, without advertng to the law under which it was decided.

Of the same character was the case of *Pascal v. Sanvinet et al.*, decided in 1846, and reported in manuscript. The husband and wife, by a decree, were separated in property, after which she delegated to him extensive and general powers for the management and administration of her affairs. Two years after this the husband, under this power, executed the notes and mortgage in question, "stating in the act that the sum was due by his wife in consequence of a loan made to her by the defendant, and which he, as her agent, acknowledged to have received." And the court say: "There is no proof that any part of this loan passed into the hands of the plaintiff or that it was applied or turned to her benefit. She was not personally present at the execution of the act, and is not shown to have been aware that the loan had been made or the mortgage granted."

From these facts there would seem to have been no mode by which the wife could be bound, except by showing that the money was applied to her use. This, on being shown, would, it is supposed, have confirmed the agency. It would have established the *bona fide* character of the act done by the husband. As a matter of evidence, then, to explain the nature of the transaction, proof that the loan accrued to the benefit of the wife was necessary to bind her. It must be admitted that the general language of the court covers the ground assumed by the counsel for the appellant. They say: "It has been settled by repeated decisions of the late supreme court, that it is incumbent on the party claiming to enforce the contract of a married woman to show that the contract inured to her separate advantage." And they cite the case of *Brandegee v. Kerr and Wife*, and repeat, "that the circumstance of the wife having a separate advantage in the contract, being of the essence of her obligation, must be proved." In answer to these remarks, it may be said that the case turned upon the suretyship of the wife and not upon the application of the money. The act was done by the husband without the knowledge of the wife, which shows that it was done for his benefit.

It was held, 2 Martin, N. S., 39, that the wife may bind herself jointly and severally with her husband, provided she renounces the law of Toro in due form. And that, when this is done, the creditor need not prove that the engagement turned to her advantage. But she cannot bind herself as surety for her husband, not even by binding herself *in solido* with him. That decision was made in 1823.

In *Gasquet v. Dimitry*, 9 La., 585, it was held, "where the wife signs an act of mortgage with her husband, given to secure a debt for his benefit, in which she renounces formally all her rights, privileges and mortgages on the property, ceding and transferring them to her husband's creditor, was a contract entered into by the wife conjointly with her husband, binding herself for his debt, which, being prohibited by article 2412, was void." The court in their opinion say: "The counsel for the appellant, in support of the position that the agreement on the part of the wife to renounce her claims on the mortgaged property is null and void, relies upon article 2412." After citing the article, they observe: "The question thus presented is to be decided by us without reference to the laws of Toro, which have no longer here the force of laws, and independently of former decisions of this court while guided by the Spanish jurisprudence; but we are called on to say what, in our opinion, is the law of the land on this subject as established by the code standing by itself." On a rehearing of the above case the court held that the wife was the surety of the husband, within "the sense of article 2412, and that the act was consequently void." And it appears that the legislature, being dissatisfied with the decision, passed an act declaring "that married women, aged twenty-one years, shall have the right to renounce, in favor of third persons, dotal, paraphernal and other rights," in a certain form, etc.

In the case of *E. Monfort v. Her Husband*, 4 Rob., 453, it was held "that the purchaser of dotal property, legally alienated, has nothing to do with the investment of the proceeds, and that the husband alone has the administration of the dowry. If he misapplies it, there is a lien of the wife on his property."

The law of Toro declared: "The wife shall not be bound in anything, unless it shall be proved that the debt was converted to her benefit." In reference to this provision the court said, in the case of *Darnford v. Gros*, above cited: "Whether that restriction was attended with inconvenience is not for us to consider. Our duty is to declare the law, not to modify it." But that law being repealed and another substituted in its place, declaring only "that the wife should not be bound as the surety of the husband," it is not to be supposed that a citation of decisions made under the law of Toro by the court, in cases where the wife was clearly the surety of the husband, was designed essentially to modify the substituted act. That, in many cases, as a matter of evidence, to charge the wife, it may be necessary to prove that the loan was applied to her use, may be admitted. But, under the above article, we think that such evidence cannot be required as a matter of law. The cases cited did not turn upon that ground.

But there is another view, arising from the facts of this case, which will now be considered. This is a suit in chancery, and it is governed by the general principles of such a proceeding. No new principle is introduced to affect the relation of the parties, or to modify rights growing out of their contract.

§ 102. *Under the code of Louisiana a feme covert may act fraudulently so as to deprive her of relief in equity.*

It is a principle in chancery, that he who asks relief must have acted in

good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abettor of iniquity, and we suppose that this principle applies to the case under consideration. A *feme covert*, acting on her own responsibility, under the liberal provisions of the Louisiana law, may act fraudulently, deceitfully, or inequitably, so as to deprive her of any claim for relief. This results from the capacity to make contracts with which the law invests her.

Heath, the agent, as has already been said, acted in good faith. He proceeded deliberately, under legal advice, and there is no ground to charge him with unfairness or collusion against Mrs. Bein. Assurances were made to him, in the presence of his counsel, by Bein, acting in behalf of his wife, that the loan was for her; that it was *bona fide* and without any concealment. Resting upon these and other assurances, the contract of loan was made, the mortgage was executed by Mrs. Bein, and the money paid by Heath to her, under the direction and sanction of his counsel. Now if these representations were false, and Heath was thereby induced to part with the money, can the complainant have a standing in equity?

Such a proceeding would be fatal, it is supposed, under the law of Toro. For if it were admitted that, to make the loan binding on the wife, it must be proved to have inured to her use, yet if, through the fraudulent intervention of the husband, she negotiated the loan, giving to it her special sanction, equity would not relieve her. A doctrine contrary to this would enable the wife to practice the grossest frauds with impunity.

For nearly five years after the loan the interest was punctually paid by Mrs. Bein, the house and lot were insured, and the policy annually assigned for the benefit of the mortgagee. These facts, connected with the representations which induced Heath to loan the money, show, if the loan was in fact for the husband, a deliberate fraud on her part. Under such circumstances, we think the complainant cannot invoke the aid of a court of chancery. She has acted against conscience, in procuring the funds of the mortgagee. The law protects her, but it gives her no license to commit a fraud against the rights of an innocent party.

In the repeal of the law of Toro, and in substituting in its place article 2412, the legislature gave the most unequivocal evidence against the policy of that part of the repealed law which required proof to charge the wife that the money borrowed was applied to her use.

But in affirming the decree of the circuit court, we place our opinion upon the unconscientious acts of the wife. The decree of the circuit court is affirmed.

TANEY, C. J., and JUSTICES NELSON and GRIER, dissented.

REID v. ROCHEREAU & CO.

(Circuit Court for Louisiana: 2 Woods, 151-156. 1875.)

STATEMENT OF FACTS.—Bill filed by Mrs. Reid to set aside a sale of real estate made by the assignee in bankruptcy of her husband. In August, 1867, Mrs. Reid had, as her separate paraphernal estate, over \$6,000. She bought two lots for \$2,200, and paid out of her separate estate \$1,000 at the time of the purchase. In December, 1867, the property was conveyed to Mrs. Reid,

and in March, 1868, she paid the remaining purchase money, \$1,200, out of the same fund, as she alleges. The conveyance made to Mrs. Reid did not recite that it was paid for out of her separate estate, or that it was to be held as her separate property. Mrs. Reid built a house on the property in question which cost \$7,500, and was also paid for, as she alleges, out of her separate paraphernal property.

On March 26, 1873, Mrs. Reid, with her husband, mortgaged the property to Hyde to secure a loan to the husband of \$4,456. The act of mortgage contained a declaration to the effect that, though the property had been acquired in the name of Mrs. Reid, it was purchased with funds belonging to the community and was community property. The act was never read over in full to Mrs. Reid, and it was not signed by her in the presence of the notary, but of Jones, his clerk, who subscribed it as a witness, and who purported to explain it to her, and offered to read it. The notary himself never explained the nature of the mortgage to Mrs. Reid separate and apart from her husband before she signed it, and never saw her until long after its execution.

§ 103. *A married woman cannot, in Louisiana, mortgage her separate property except in the manner prescribed by law.*

Opinion by Woods, J.

The mortgage, purporting to be executed by Andrew J. Reid and his wife, the complainant, was not executed according to law by the complainant, and was not effectual to bind her separate estate. Though signed by the wife, it is not her deed. If the property were her separate property, the law points out the manner in which she should proceed to mortgage it for the benefit of her husband, and that method was not pursued. By the civil as well as by the common law, the property of the wife cannot be conveyed or incumbered except in the manner prescribed by law.

§ 104. *A married woman is not estopped by a declaration in her mortgage that the property is community property.*

The wife is not estopped by the declaration made in the mortgage to the effect that the mortgaged property was community property, even if the mortgage had been executed with all the forms prescribed by law. *Bouligny v. Fortier*, 16 La. An., 209; *Beauregard v. Her Husband*, 7 id., 293; *Thibodeaux v. Hespain*, 5 id., 578; *Bisland v. Provosty*, 14 id., 169; *Gasquet v. Dimitry*, 9 La., 589.

§ 105. *Evidence stated showing that the wife did not pay for the property from her paraphernal funds alone.*

The mortgage in question not having been executed by the complainant according to law, the statement therein made, that the property mortgaged was community property, no more binds the wife than a declaration made orally to the mortgagee that such was the fact. As the wife cannot be estopped by any such declaration, the question is left entirely open for examination: Was the property mortgaged the paraphernal property of the wife, or was it the property of the community? If it was the former, the mortgage is void; if the latter, it is valid and binding. The evidence shows that the lots and the house erected thereon cost \$9,700. In addition to this sum there was expended in additional permanent improvements on the premises, in 1871 and 1872, the further sum of \$670, thus making the entire cost of the property \$10,370. The entire paraphernal estate of the complainant invested in the property was \$6,429. Now, under this state of facts, what are the rights of the wife, complainant in this case?

I think this question is conclusively settled by the decisions of the supreme court of Louisiana. In the case of *Bass v. Larche*, 7 La. An., 104, the husband claimed, as his separate property, certain lands and slaves purchased by him during the marriage. In passing upon the case the court said: "The plaintiff purchased property to a much larger amount than he had funds to pay for at the time, gave some obligations, and assumed the payment of others; it may be doubted whether such a purchase could, under any circumstances, be considered as an investment of separate funds."

In the case of *Boulligny v. Fortier*, 16 La. An., 214, the court say: "We have searched in vain in our reports for a case where the right of the wife to invest beyond her means was sanctioned by this court, but we have, on the contrary, found numerous decisions setting aside conveyances made to the wife on her failure to show adequate means. As the ability of the wife to acquire, during the marriage, property in her own name and for her separate account is, under our jurisprudence, an exception to the general rule (Civil Code, 2374), it must be, therefore, rigidly and strictly construed, and, consequently, the wife is required not only to prove that she had paraphernal effects at her disposal, but also that they were ample to enable her reasonably, at least, to make the new acquisition; otherwise the contract will be treated as a contract of the community."

§ 106. *Mingling her paraphernal with the community funds, she becomes a creditor to the amount of her investment, and cannot claim the whole as her separate estate.*

These authorities seem to settle the case against the claim of the complainant. Giving the largest effect to the testimony of complainant, she only had \$6,429 to invest in the property, and the evidence shows beyond question that it cost \$10,370. It seems clear that when a wife mingles her own paraphernal funds with the community funds, in the purchase of property, she cannot claim the whole as her separate estate. The property belongs to the community, and she is the creditor of the community to the amount of her investment. Such I believe to be the decisions of the supreme court of this state on this subject, and they are binding on this court.

The complainant's bill must, therefore, be dismissed at her costs.

CARITE v. TROTOT.

(15 Otto, 751-765. 1881.)

APPEAL from U. S. Circuit Court, District of Louisiana.

Opinion by MR. JUSTICE MATTHEWS.

STATEMENT OF FACTS.—This is a bill in equity filed by Félicité Trotot, the appellee, to foreclose a mortgage and for the sale of the mortgaged property, consisting principally of a sugar plantation with its improvements, in Louisiana. The property originally belonged to Jean Baptiste Clement, a citizen of France, who, and also his agent and attorney in fact, Antoine C. Tremoulet, by whom he was represented in the transactions in question, are parties to the suit, and appellants, with Celestine Carite and her children. Clement, through Tremoulet, sold the property September 22, 1869, to the firm of Copponex & Co., composed of Copponex, Moulor and Carite, the husband of Celestine, for \$55,000, of which \$10,000 was paid in cash, \$6,764 was an incumbrance in favor of the Citizens' Bank of Louisiana, assumed by the purchasers, and the remainder, evidenced by their four promissory notes for \$9,559 each, payable

respectively September 1, 1870, 1871, 1872 and 1873, with interest at eight per cent. per annum, amounting to \$38,236, was secured by mortgage upon the premises.

On January 11, 1871, Copponex sold his interest in the firm business and this property to his partners for \$10,000 cash, they assuming the debts of the partnership; and on December 30, 1872, Moulor sold his interest to Carite for \$55,000, in addition to the assumption by the latter of the incumbrance in favor of the Citizens' Bank, amounting then to \$5,573, and three unpaid notes of \$9,559 each, with interest, still due to Tremoulet as agent for Clement. For the purchase money agreed to be payed to Moulor, Carite gave eleven promissory notes of \$5,000 each,—three payable in one year from date, two in two years, two in three years, two in four years and two in five years,—secured by mortgage upon the plantation.

The appellee claims to be the holder and owner of five of these notes, the first three and the second two bearing interest at the rate of eight per cent. per annum, and to have the right, they being overdue and unpaid, to foreclose the mortgage given by Carite to Moulor, and sell the mortgaged premises for the payment of the amount due thereon. She also insists that her mortgage securing the debt is the first and best lien upon the premises, except what may still appear to be due to the Citizens' Bank.

As the grounds of this priority, the bill alleges that on February 10, 1873, Casimir Carite, conspiring with his wife, Celestine Carite, and Tremoulet, induced the latter to institute, in the circuit court of the United States for the district of Louisiana, proceedings, by executory process, in the name of Clement, upon the mortgage and notes given by Copponex & Co., for the seizure and sale of the premises, and caused them to be sold to Tremoulet for a price less than the amount due to the Citizens' Bank, and the amount claimed to be due to Clement, and the title was conveyed to him accordingly; that the proceedings and sale were simulated and fraudulent, the possession of Casimir Carite not being disturbed thereby, and the object being to defraud the appellee and his other creditors; and that, in point of fact, the debt originally due from Copponex & Co. to Clement, secured by the mortgage to the latter, was, at the date of said proceedings and sale, paid and extinguished; that, in further prosecution of the same conspiracy and fraud, Casimir Carite induced and caused his wife, on February 13, 1873, to file a petition in the parish court of St. James, in Louisiana, representing that she was married to him April 23, 1863, and that there existed between them a community of acquests and gains, which allegations, it is admitted, were true, but further setting forth that he had become hopelessly involved in debt, which, it is alleged, was false, and prayed for a judgment of separation of property from him; that a pretended defense was made by him to the petition, on which judgment was rendered in her favor, separating her in property from him, and dissolving the community of acquests and gains theretofore existing between them; that this proceeding was fraudulent and void, because it was voluntary and by consent, because the wife had no claim against him and alleged none, and assigned no reason in law why such separation should be decreed, because there was no derangement of his affairs, and no allegation that his wife could conduct the business of the plantation better than he, the latter in point of fact having conducted the same after the decree, as before; and because said judgment was never published as required by law, nor ever executed in any manner by the issue of any writ; that in further pursuance of said conspiracy and fraud, Tremoulet,

on May 22, 1873, pretending to act as his agent, made to Celestine Carite a pretended sale of the said plantation and property for a sum sufficient to cover the amount alleged to be due to Clement, although that debt, or a large part of it, had previously been satisfied and extinguished.

The prayer of the bill is that the proceedings under which Tremoulet purchased the premises for Clement, the decree of separation of property from her husband on behalf of Mrs. Carite, and the sale and conveyance to her of the plantation by Clement, be adjudged to be void and be set aside, and that the complainant's mortgage and debt be charged as the first lien on the same, and be satisfied by a sale thereof for that purpose.

The final decree of the circuit court is substantially in accordance with the prayer of the bill, declaring that the sale to Tremoulet for Clement, and by him to Celestine Carite, be set aside and annulled as simulated and illegal; that the judgment of separation of property between her and her husband is null and void for want of publication; that the plantation and property be recognized as belonging to the community formerly subsisting between Carite and his wife, as it did before said simulated sales were made; and that the complainant had established the mortgage under which she claims, as a valid and subsisting lien upon the property to secure the sum of \$25,000, with interest at the rate of eight per cent. per annum from December 30, 1872, for which, if not paid within sixty days, it was ordered that the premises be sold. The object of this appeal is to review that decree.

§ 107. *The effect of seizure and sale of property under Louisiana process.*

The first question it presents relates to the validity and effect of the judicial proceedings taken by Tremoulet, which resulted in the sale of the property to Clement. Against its validity it is asserted in the bill that the debt to Clement, at the time of the sale had been extinguished, and that the proceeding, therefore, was a mere pretext and cover for an intended fraud. But the evidence leaves no doubt that this was an unfounded suspicion. It is abundantly established by the proof that at the time of the sale there was still due, on account of the debt to the Citizens' Bank assumed by Carite, \$5,573, and that two of the notes for \$9,559 each, on one of which interest had been running from January 15, 1873, and on the other from its date, September 1, 1869, were overdue and unpaid; and that another note of the same series and of the same amount, falling due September 1, 1873, was held by Tremoulet for Clement, the whole amounting to \$34,395.40.

The proceeding itself, though summary, was familiar in practice in such cases, and strictly according to the law of Louisiana, and if not voidable on other grounds, had the effect to vest in Clement an absolute title to the property, free of all subsequent incumbrances. It was executory process which is authorized (Code of Practice, art. 732) "when the creditor's right arises from an act importing a confession of judgment, and which contains a privilege or mortgage in his favor," which is the case (art. 733) "when it is passed before a notary public or other officer fulfilling the same functions, in the presence of two witnesses, and the debtor has declared or acknowledged the debt for which he gives the privilege or mortgage." By article 3360, Civil Code, it is declared "that the debtor cannot sell, engage or mortgage the same property to other persons to the prejudice of the mortgage which is already acquired to another creditor;" so that the seizure and sale, by virtue of executory process under a mortgage, are not affected by the existence of subsequent mortgages, the owners of which are not made parties to the proceeding. The security of

the latter in that event is transferred to the proceeds of the sale, and their protection consists in the requirement that no sale shall take place for less than two-thirds of the value of the mortgaged property, as appraised for that purpose. This effect is expressly declared by Code of Practice, arts. 707, 708. *Hart v. Foley*, 1 Rob. (La.), 378. It follows, therefore, that unless the judicial sale to Clement is a nullity, the mortgage lien of the appellee is itself extinct, though the mortgage debt will survive as a personal obligation.

§ 108. *Subsequent incumbrancers cannot set aside a conveyance to the wife of the mortgagor made by the creditor in pursuance of agreement with her.*

It is contended, however, by the appellee that this sale to Clement was void, as a fraud upon her rights as a creditor of Carite, because, taken in connection with the subsequent sale to Mrs. Carite, it was intended to defeat the claims of the creditors of her husband, and to place this property beyond their reach.

The circumstances attending the transaction are these: Carite was undoubtedly insolvent. Two of the notes held by Tremoulet for Clement had become due and remained unpaid. He was in arrears on account of interest. He was embarrassed by other debts, for which he was pressed, so as seriously to threaten the uninterrupted prosecution of the business of the plantation. The notes were placed by Tremoulet in the hands of an attorney for collection. The necessary formal preliminary demand of payment was made. A negotiation for an extension of time was begun by Carite, who suggested that he could make such an arrangement with all his creditors. Tremoulet told Carite that he had no desire to acquire the property, as he represented Clement, who resided in France, and who did not wish a sugar plantation, and would not know what to do with one if he had it; but that he would feel obliged to act upon the matured notes if the consequence of non-action was to be the seizure of the mortgaged property by other creditors and the consequent diminution of the security. The upshot was his promise to abstain from a seizure under the mortgage until Carite should have time to arrange with his creditors, provided no seizure was made by other parties.

What efforts Carite made to obtain from other creditors the desired indulgence do not appear, but if any were made they did not succeed. On February 7, 1873, Tremoulet, in a letter to Clement, reported that by an arrangement with Carite the latter would make no objection to the sale and seizure of the immovables, and would rather facilitate the execution thereof on condition that Tremoulet would oblige himself, buying them in Clement's name, to resell the same to his wife, from whom he was separated in property, at a price that would cover all that was due to Clement, including interest, costs and attorneys' fees, provided that nobody should put in a higher bid than that amount, the accrued interest to be paid in cash. The terms, he added, were not then fixed, but might be soon, and said that he should not be too exacting, knowing that Carite continues the plantation at his own expense, that everything predicted a good crop, and, notwithstanding the depreciation in the value of real estate, the plantation was adequate security for the mortgage to Clement.

On February 10, 1873, Neal and McIntyre, citizens of Kentucky, commenced a proceeding in the circuit court for the sequestration of ten mules on the plantation, on which they as vendors claimed to have a lien and privilege for the unpaid purchase money, amounting to \$2,150, and a writ was accordingly issued to the marshal, requiring him to seize and take possession of them. On the same day, in consequence of this proceeding, Tremoulet caused executory

process to issue in behalf of Clement, and seized the mortgaged property, including the mules sought to be subjected by Neal and McIntyre, which he claimed were subject to the Clement mortgage, because they had become immovables by destination. The plantation and property were taken into possession by the marshal, though Carite was permitted to remain for the purpose of attending to the growing crop, and were advertised for sale. Mr. Edward D. White, Tremoulet's attorney, testified as follows:

"During the seizure and before the sale quite a number of the creditors of Moulor, Copponex & Co. and Carite called on me. To all of them I stated exactly what had been said to Carite; that is, that the seizure of the property had been provoked by the threatened removal of the immovables by destination; that the property was not desired by the plaintiff; that he had no intention of bidding on it beyond the amount of his claim, with costs and charges; that Carite had been told if he could successfully arrange with his creditors, indulgence would be given and proceedings stopped."

On March 3d, Tremoulet reported by letter to Clement the fact of seizure and that the property was advertised for sale, saying: "I am waiting for Mr. Carite to make our arrangements for the sale that I shall make to his wife." The sale was had on April 5th, and on April 10th Tremoulet reported that fact by letter to his principal, saying: "In case the plantation would have brought wherewith to cover your debt, capital and interest, it was understood that I would not buy the same in, but would receive the amount due you. . . . Now, I am awaiting Mr. Carite to sell the plantation back to his wife on the terms agreed upon. It is well understood that you shall have to bear no costs, the sale having been made only for the purpose of relieving the plantation from the embarrassments in which Moulor had placed it." He then proceeds to explain the reasons for the resale as proposed, and said: "Another important reason is, that I could not do you justice in charging myself with the administration of this property at the distance where I am. . . . In one word, I preferred in your own interest to resell the plantation, taking all possible precautions, rather than to work the same for your account, notwithstanding the fine prospect of the present crop." On May 26th he reports the conclusion of his negotiations with Mrs. Carite and the resale to her, giving the details of the purchase. He says: "I have been obliged to accept from Mrs. Carite a smaller amount than the amount agreed upon in order to make the sale of the immovables, and this in your interest; it was preferable to accept these terms than to keep the plantation and work the same for your account, at the present price of labor. In case I should have refused to effect an understanding with Mrs. Carite, I would not have found a purchaser that would have taken the plantation on the same terms."

We see nothing in the circumstances of the case as disclosed in this record to impeach the good faith, or affect the validity, of this transaction. Clement had the unquestionable right to subject to judicial sale the property, held as security for his debt, and become its purchaser at two-thirds of its appraised value. No one was wronged by such a procedure, although it had the effect to disappoint every other creditor. The sale was open and public, and there is no suggestion of any attempt to prevent the property from bringing the best price. Every subsequent incumbrancer had the right and the opportunity to bid upon it, and, if he chose, to buy it for himself. If he neglected or declined to do so, it must be assumed that he made his decision in the pursuit of his own interests. The title acquired by Clement was indefeasible and

absolute. No right of redemption remained, and it was subject to no trust. He could dispose of it at his own will. If he chose so to do, he was entirely free to convey it, on any consideration he approved, to Mrs. Carite; as much so, if she was legally capable of receiving title, as to any other person. And what he could lawfully do with the property after it had become his own, he could agree to do in advance. In all this there is nothing whatever that touches the right of any creditor of Carite. It is a lawful end, pursued by lawful means; and if, by reason of it, others have sustained any loss, it is because the property was not sufficient to pay all for which it had been pledged, or because those interested in the security voluntarily sacrificed their own interests. In neither event is there ground for complaint. The course of Tremoulet seems to have been dictated, as it was justified, by a wise regard to the interests of his absent principal. It was a mere measure of self-protection, to disembarass the property of debt, to protect it against disorganization and waste, justly apprehended as the result of seizures by subsequent mortgagees and lien-holders, or which might have occurred if Carite, driven to that necessity, had surrendered it to the delays and expenses of administration and sale in a court of bankruptcy. We cannot perceive, in the acquisition and disposition of the title by Clement, either an intention or a tendency to impede or defeat the just rights of the appellee, or any other creditor of Carite.

§ 109. *The "separation of property" obtained by a wife considered with reference to informalities under the code.*

It is further contended, however, that the decree of separation of property between Carite and his wife is void; that she having no capacity, therefore, to receive and hold the title to this plantation as separate property, it inured to the community as before, and was replaced, subject to the previously existing liens in their order. It is not conceded that this consequence would result if it should be adjudged that the community had not been interrupted, for it is claimed that the sale to Clement, having necessarily destroyed the lien of all subsequent incumbrances, a conveyance to Carite himself, although it would have made the property liable to the pre-existing debts of the community, it could be subjected only by process, open to general creditors by means of judgment and levy under execution. However this may be, we proceed to examine the grounds on which it is urged that the decree of separation of property rendered on the petition of Mrs. Carite should be annulled.

The first of these, and the one on which the circuit court based its decree, is that the judgment was never advertised, in violation of article 2429, Civil Code, which provides that "the separation of property obtained by the wife must be published three times in the public newspapers, at the farthest within three months after the judgment which ordered the same."

The fact that no such publication was made is not denied, but its omission, it is insisted, does not avoid the judgment. And such is the construction put upon this article by the supreme court of Louisiana. In *Turnbull v. Davis*, 1 Mart. (La.) (N. S.), 568, that court said: "It is true that, by law, publication of a separation of property between husband and wife is expressly required; but the pain of nullity is not denounced against a neglect of such publication. It is not a prohibitive regulation, which might, in some instances, imply nullity. We are, therefore, of opinion that a judgment of separation, unattended by publication, is not *ipso facto* void; but if such laches afford any ground for annulling and declaring it inefficient, it can only be decreed on showing fraud and injury to third parties as a consequence of omitting the publication. In

the present case there is no positive testimony that the defendants have suffered injury, resulting from the neglect to publish the decree of separation; nor can such injury be legally presumed from the whole tenor of the evidence." The authority of this case was recognized, and the decision followed, in *Raiford v. Thorn*, 15 La. Ann., 81, decided in 1860.

We have examined *Spires v. McKelvy*, 23 id., 571; *Levistones v. Brady*, 11 id., 696; *Bostwick v. Gasquet*, 11 La., 534, and *Heyman v. The Sheriff*, 27 La. Ann., 193, to which we have been referred by counsel for the appellee, and do not find in them anything which overrules the decisions cited above, or that is inconsistent with them.

It is next objected that the judgment of separation of property is null, because, in violation of article 2428, Civil Code, it was not executed. That article reads as follows: "The separation of property, although decreed by a court of justice, is null if it has not been executed by the payment of the rights and claims of the wife, made to appear by an authentic act, as far as the estate of the husband can reach them, or at least by a *bona fide* non-interrupted suit to obtain payment."

It will be observed that the language of this article differs from that of article 2429, just considered, in expressly denouncing nullity as a consequence of non-compliance with its requirements. But the nature of the execution must have relation to the nature of the judgment, and the terms of the article manifestly refer to cases where the judgment involves the transfer of property, or the payment of money, and not the mere question of the future *status* of the wife, and her right, independent of her husband, separately to acquire property in her own right. This is the view taken by the supreme court of Louisiana in the case of *Jones v. Morgan*, 6 La. Ann., 630, in which it is said that "the article of the code requiring execution to issue within a limited time after the decree of separation, under a pain of nullity, is only applicable to cases in which there is a judgment against the husband for a sum of money. This precaution is, no doubt, intended for the protection of those with whom the husband is in the habit of dealing. But, in this case, the object of the action was not to recover moneys of the wife; it was simply to put an end to the community, and then to secure to the wife and her children the future earnings she might derive from her untiring industry."

In such a case the intent and effect of the judgment are merely to confer upon the wife, in respect to her future acquisitions, the fruits of her own industry, and the savings of her own economy, the right to act separately from her husband, as though she were sole; and the right becomes fixed and vested by its actual exercise. *Holmes v. Barbin*, 13 La. Ann., 474. This is what is meant by what the supreme court of Louisiana say in *Muse v. Yarborough*, 11 La., 530, that "it is not the mere judgment of separation which renders the parties separate of property. The judgment recognizes the necessity for separation and judicially authorizes it; but if not followed by a *bona fide* execution, it produces no effects, even between the parties."

It is only when the judgment of separation of property is founded on a cause which results in the establishment of some claim against the husband's estate susceptible of execution, by some authentic act, or by judicial process to enforce it, that a neglect or failure to insist upon its execution is deemed conclusive evidence that it is the intention of the parties not to dissolve the community. The law in such cases for the protection of creditors, otherwise liable to be misled, annuls the unexecuted judgment of separation. *Handy v.*

Sterling, 1 La. Ann., 308; Longino v. Blackstone, 4 id., 513; Succession of Hearing, 28 id., 149.

The costs of the suit, which Carite was condemned to pay, can hardly be considered any part of the judgment of separation of property, of which execution is required, and hence the failure to attempt their collection cannot affect its validity. In all other respects his wife assumed and exercised the right conferred upon her by the judgment dissolving the community between him and her, by the very transaction in question, acquiring by purchase the title of a plantation, which she has since administered, not less in his life-time than since his death, so far as the record discloses, in her own name and right, and has thus, in the meaning of the law, executed the judgment of separation.

§ 110. *Husband's financial embarrassment may justify a separation of property under the code of Louisiana.*

It is next objected that this judgment is void for want of any legal ground to justify it. The grounds on which it was prayed for in the wife's petition are thus stated: "Petitioner further represents that, owing to a series of crushing misfortunes, her husband, who was heretofore possessed of considerable means and property, has lately become hopelessly involved in debt, for the satisfaction of which all his property is now being attached, seized and disposed of by his numerous creditors. That all of her husband's property will not be sufficient to pay and satisfy the enormous debt which is due by him. That, in consequence of the above recited circumstances, petitioner fears and believes that the earnings of her separate industry may be seized by her husband's creditors, and thus be lost to herself and children; for which reasons petitioner is desirous of being separated in property from her said husband."

This petition was filed February 13, 1873. This was after the writ of sequestration issued by Neal and McIntyre had been executed, and after the seizure made by Tremoulet under his executory process in behalf of Clement.

Article 2425, Civil Code, which it is alleged regulates this proceeding, reads as follows: "The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to the mismanagement of her husband or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims."

An authoritative construction of this article is found in *Wolf v. Lowry*, 10 La. Ann., 272. The court there say: "In *Davock v. Darcy*, 6 Rob., 342, it was held that the right of the wife to a separation of property was not limited to the cases mentioned in article 2399 (now 2425) of the code, and that she might obtain a separation of property when the habits and circumstances of her husband rendered it necessary to preserve for her family the earnings from her industry or talents. The same question was afterwards decided in the case of *Penn v. Crockett*, 7 Ann., 343, when the right of the wife, which had been made the basis of the action of separation of property, was the value of a slave which had been given to the wife during marriage, and had been alienated by the husband. The court reaffirmed the former decision and held that, in case of the derangement of the husband's affairs, this was sufficient to authorize a judgment of separation of property in favor of the wife. After these repeated decisions we must consider the law as settled, the question being one of the construction of statutory laws, involving no fundamental principles."

This doctrine, that a claim for money or property on the part of the wife is not necessary to support a judgment of separation, was reaffirmed in *Mock v. Kennedy*, 11 La. Ann., 525, where the court say: "It is sufficient for a married woman to prove that she had the skill and industry to earn a separate livelihood, which she had exercised; whether as a seamstress, teacher, milliner or (as in the case at the bar) a shopkeeper, is not material; she is entitled, under the humane spirit of our jurisprudence, upon proof of this fact accompanied by proof of the insolvent condition of her husband's affairs, to call upon the court, by a judgment of separation, to protect the fruits and earnings of her separate industry from being squandered by her husband or seized by his creditors."

In *Webb v. Bell*, 24 La. Ann., 75, a judgment of separation, on appeal, was affirmed, notwithstanding the petition of the wife was opposed by the husband on the ground that there was neither allegation nor proof that the plaintiff had, at the time of the institution of the suit, a separate trade or industry of any kind from which she was deriving revenue or means inuring to her own benefit. The sole ground of the judgment was the embarrassed circumstances of the husband's affairs. The court said: "The purpose sought by separation of property and dissolution of community in this case seems to be to enable the wife, by the use of her own limited means and those she might obtain through her relatives, to earn for herself and child a support, without having her earnings fall into the community."

The same point was expressly decided in *Meyer v. Smith & Co.*, id., 153, where the only allegation in the petition, on which the judgment was based, was that, "owing to the insolvency of her husband, it becomes necessary for the preservation of her acquisitions, the education, maintenance and support of herself and family, that a dissolution of the community, etc., be decreed."

It is also objected to the judgment of separation that it was by consent, and, therefore, null, as equivalent to a voluntary separation, made void by article 2427, Civil Code, and that it is not supported by evidence. Both these objections are met by the case of *Powlis v. Cook*, 28 id., 546. In that case, as in this, the husband consented that the case might be fixed and tried, but, as the court then said, "that did not make it a consent judgment." And as to the proof of the husband's insolvency, the court then say, what may be adopted here, it "is manifest from this litigation, if not otherwise shown."

§ 111. *The jurisdiction of the parish court of Louisiana extends to suits for separation of property.*

It is also urged that the parish court had no jurisdiction to entertain a suit for separation of property. No adjudication to this effect by the supreme court of Louisiana is referred to by counsel; while, on the contrary, it is tacitly assumed to exist, in the case of *Willis v. Ward*, 30 id., 1282. Article 87 of the constitution of the state of 1868, then in force, prescribes that parish courts "shall have exclusive jurisdiction in original suits in all cases where the amount in dispute exceeds \$100, and does not exceed \$500." The only limitation of the jurisdiction is as to the amount of money involved in the controversy, and has no relation to the question, where the suit is not prosecuted for the recovery of money or money's worth.

It is finally urged that the property in controversy belongs to the community, notwithstanding the judgment of separation. But on the admission of the validity of the sale to Clement, and of the judgment of separation of property, it is impossible to maintain this position for, on that supposition,

Clement had the right to dispose of the title to Mrs. Carite, precisely as to any other person capable of purchasing. The sale was made on credit, except as to the small sum of \$1,243.73, and it does not help the contention of the counsel for the appellee on this point to admit what he says, "that every cent that Mrs. Carite has paid on account of the purchase of the plantation was simply a part of the profits of the plantation itself;" because it is not claimed that any portion of those profits accrued prior to the time when all the interest which Carite, or any of his creditors, subsequent in right to Clement, ever had in the property, had been divested by the sale to him. Consequently it is fully shown that the community had no claim to any of the consideration paid by her for her purchase.

Upon these grounds the circuit court should have dismissed the bill of the appellee for want of equity, and for this error the decree will be reversed and the cause remanded, with directions to render a decree dismissing the bill; and it is so ordered.

§ 112. Full age or minority of wife.—The presumption is that a *feme covert* is of full age until the contrary is shown. *Battin v. Bigelow*, Pet. C. C., 452.

§ 113. A lawful partition among tenants in common is not presumed as against the demandant, from lapse of time, loss of records and acquiescence, if the demandant was married under age, and continued under coverture until a short time before action brought. *Weatherhead v. Baskerville*, 11 How., 829.

§ 114. A legacy to be delivered to A. when she reaches eighteen years of age, with a limitation over if she dies before that time, vests no title in her husband, where she marries at sixteen, until the prescribed age is reached. *Price v. Sessions*,* 8 How., 624.

§ 115. Time and place of performance.—The place of performance of a contract of marriage is not where the marriage is solemnized, but where the parties intend afterwards to reside and discharge their marital relations; hence the validity of marriage contracts is to be governed and determined by the laws of such latter place. *Campbell v. Crampton*, 18 Blatch., 152 (CONTRACTS, §§ 1190-94).

§ 116. How far the law, as it exists at the time of marriage, controls the disabilities and rights of a married woman. *Sims v. Everhardt*, 12 Otto, 800 (§§ 884-89).

§ 117. Personal and political rights.—A married woman, joining the enemy in company with her husband, *held*, no offender under the New Jersey act of 1778, relating to forfeited estates. *Kemp v. Kennedy*, Pet. C. C., 30.

§ 118. The domicile of the wife follows the domicile of the husband. General law of domicile discussed. *Burnham v. Rangeley*, 1 Woodb. & M., 7. But see § 539.

§ 119. A married woman may choose to which of two governments she will adhere. *Shanks v. Dupont*, 8 Pet., 242 (CITIZENS, §§ 21-23).

§ 120. The incapacities of *femes covert* at common law apply only to their civil rights, but do not reach their political rights. *Ibid*.

§ 121. Constitutional question.—Marriage is not a contract within the provision of the constitution which forbids any state from passing laws impairing the obligation of contracts; it is a civil institution or relation, to be regulated by law, so far as the rights of the parties in the property of each other are concerned, and until these rights become vested, the legislative power may modify them, from time to time, to suit the convenience and wants of society or to promote the interests of the parties. *Starr v. Hamilton*, Deady, 278 (§§ 227-31).

§ 122. Husband's inchoate rights before marriage.—The inchoate rights of an intended husband in his intended wife's estate under a marriage contract are mere equities, and do not, in any just sense, constitute any legal or equitable estate in her lands or other property antecedent to the marriage. *Crane v. Morris*, 6 Pet., 598.

§ 123. Marriage of administratrix.—A. brought an action of *assumpsit* and died after issue joined; the suit was revived by *scire facias* in the name of his administratrix; while it was still pending, the administratrix married B., which marriage was pleaded. *Held*, that the *scire facias* did not abate to the injury of the original suit of her intestate; and a new *scire facias* might issue to revive the original suit, in the name of B. and wife, as the personal representative of A., in order to enable her to prosecute such suit to judgment. *McCoul v. Lekamp*,* 2 Wheat., 111. And see as to foreclosure of mortgage, *Buck v. Fischer*,* 2 Colo. Ty, 709.

§ 124. **Community rights.**—The law of Louisiana as to community of gains or acquets between married persons does not extend, by the tenor of the constitution, to a native-born citizen of Louisiana who was married under age and constantly resided with her husband in the state of Mississippi. *Conner v. Elliott*, 18 How., 591.

§ 125. **Paraphernal property under Spanish law**—a succession accruing to wife during marriage. *Meegan v. Boyle*, 19 How., 180.

§ 126. **Disabilities of coverture.**—*Femes covert*, with few exceptions, cannot sue in court of law, but must sue in equity. *Barber v. Barber*, 21 How., 589 (COURTS, §§ 908-12).

§ 127. The bond of a *feme covert* is void. *Agricultural Bank of Mississippi v. Rice*, 4 How., 225.

§ 128. A married woman should not in admiralty be accepted as a surety, in the case of bonding a vessel worth less than sundry claims filed against such vessel. *The Ship Antelope*, 1 Ben., 521.

§ 129. A promise by a *feme covert* is void, and a subsequent promise, when sole, is void unless based on a new consideration. *Watson v. Dunlap*, 2 Cr. C. C., 14.

§ 130. A court cannot render a binding personal judgment against a married woman on her alleged personal obligation. Such judgment may be attacked collaterally. *Norton v. Meader*, 4 Saw., 621.

§ 131. A married woman cannot bind herself by acts of commission, short of those directed by law to bind her, much less by acts of omission. *Delancey v. McKeen*, 1 Wash., 354.

§ 132. The Georgia statute provides that any contract by the wife to pay the debts of her husband shall be absolutely void. *Held*, that a negotiable note signed by the wife is subject to this defense, although transferred to an innocent purchaser, and reciting on its face that it was given for advances to her. *March v. Clark*,* 9 Fed. R., 753.

§ 133. A married woman is incapable in California of contracting a personal obligation. *Norton v. Meader*, 4 Saw., 603.

§ 134. A judgment will be set aside on motion if it appear by affidavits that defendant at the time the judgment was rendered was a married woman. *Albree v. Johnson*, 1 Flip., 341.

§ 135. To give jurisdiction against a married woman her liability must affirmatively appear and will not be inferred—cases cited. *Ibid*.

§ 136. **Earnings and trade of wife.**—By the common law a married woman cannot enter into a partnership or make a valid contract of any kind. *In re Kinkad*, 3 Biss., 405.

§ 137. A married woman who engages in trade must do so in accordance with the statute of the state; otherwise her coverture is available to defeat the debt, contracted in her business, which is the basis of bankruptcy proceedings. *In re Slichter*,* 2 N. B. R., 336. And see *Tibbatts v. Tibbatts*, 6 McL., 80.

§ 138. Married women disabled from trading by common law. Exceptions to the rule created by statutory provisions. *In re Goodman*, 5 Biss., 401.

§ 139. Where a married woman engages in trading without means acquired in some one of the ways mentioned in the statute, the profits thereof belong to the husband. *Ibid*.

§ 140. The rule as to a married woman becoming a partner in a commercial firm, considered. *Lastropes v. Blanc*, 3 Woods, 184.

§ 141. Although a *feme covert* may be bound agreeably to statute, by a written agreement of lease or partnership of her separate estate, she is not bound by modification of it made by her husband without her consent. *Tibbatts v. Tibbatts*, 6 McL., 86.

§ 142. **Husband and wife as witnesses.**—The mutual exclusion of husband and wife as witnesses for each other rests on grounds of public policy, and a statute removing the disqualification of interest does not make their testimony competent. *In re Jones*,* 6 Biss., 68.

§ 143. **Crime of wife.**—Liquor selling by the wife, with the knowledge and assent of the husband, is the selling by the husband. *United States v. Burch*, 1 Cr. C. C., 36. And see 1 Cr. C. C., 571.

§ 144. **Torts upon or by wife.**—A suit brought by a husband in his own name for injuries done to a vessel, the property of his wife, with her assent, can be maintained, but the wife by her assent is estopped from thereafter suing in her own name. *The Tillie*, 13 Blatch., 514.

§ 145. A suit is properly brought in the name of a married woman when its object is to recover, from a common carrier, damages for loss of her wearing apparel. *Fraloff v. N. Y. C. & H. R. R. Co.*, 10 Blatch., 20.

§ 146. Where husband and wife sue for injuries to the wife's person, and on a plea of the general issue direct proof of their marriage is given, the defendant cannot, either to disprove marriage or mitigate damages, show that they have not cohabited for many years, or that the husband is rumored to have lived with another woman. The defense, in such cases, that plaintiffs are not married, goes to the form of the writ rather than to the cause of action, and should be pleaded in abatement and not in bar. *Packet Co. v. Clough*, 20 Wall., 528.

§ 147. Where husband and wife live apart, he being in the army, and she acquires a dwell-

ing-house by her labor, he alone can sue others for trespass *vi et armis* upon the premises. The joinder of husband and wife is not cured by amendment. *Moore v. Carter*,* *Hemp.*, 64.

§ 148. Purchase money unpaid is secured in equity by a lien on the land; and this rule applies to purchases by married women. The disabilities of a married woman are designed for her protection and not so as to enable her to commit fraud by retaining the estate of another without paying for it. *Chilton v. Lyons*, 2 Black, 458.

§ 149. A husband may recover the value of the property of his wife, which has been stolen. *Myers v. Cottrill*, 5 Biss., 465.

§ 150. Household articles, necessaries, etc.—If husband and wife move together to the house of a farmer, for whom the wife engages to keep house, bringing articles of household supply which the farmer purchases of the wife, the presumption is, that these articles belonged to the husband; and *semble* though the purchase was from the wife, and the purchaser promised to pay accordingly, the consideration moving from the husband. The wife's suit cannot be maintained. *Allen v. Eldridge*,* 8 Ch. Leg. N., 211.

§ 151. A fowling piece, pistol, fishing tackle, paintings, etc., are not necessaries under the bankrupt act, nor can the bankrupt's watch or breast-pin be claimed as wearing apparel or necessaries. But articles of jewelry of the bankrupt's wife which were given to her prior to marriage, and which she has worn ever since, cannot be claimed by the assignee; nor such gifts by husband to wife, of personal ornament or attire, as were compatible in value and character with his circumstances at the time of the gift. *In re Ludlow*,* 1 N. Y. Leg. Obs., 822.

§ 152. Husband's rights in wife's personalty.—By the common law, marriage amounts to an absolute gift to the husband of all the personal goods and chattels of the wife, of which she is in possession, at the time of the marriage, in her own right, and also of all that may accrue to her during the marriage. *Shaw v. Mitchell, Dav.*, 216. And see *In re Grant*, 2 Story, 312.

§ 153. At common law the husband has only a qualified interest in his wife's *choses in action*, which he can make absolute by reducing them to possession. *Shaw v. Mitchell, Dav.*, 217.

§ 154. If courts of equity obtain jurisdiction of *choses in action* of a wife in the process of reducing them into possession by the husband, they will require of him a suitable settlement for the wife. *Ibid.*

§ 155. On a bill in equity by husband and wife to recover property of the wife, the court will direct a settlement upon the wife unless satisfied that she voluntarily waives it. *Ward v. Amory*, 1 Curt., 419.

§ 156. A court of equity will require a suitable settlement to be made upon the wife out of her *choses in action* not yet reduced into possession by her bankrupt husband. *Shaw v. Mitchell, Dav.*, 219.

§ 157. The doctrine of the wife's equity to a settlement has no application to the case where the husband has reduced a legacy to possession with his wife's assent and without legal process. Delaware statute of 1865 does not make such legacy the wife's separate estate. And a note and check afterwards given by the husband to his wife for the proceeds of the legacy are unenforceable by her as claims against his bankrupt estate. *Canby v. McLear*,* 13 N. B. R., 22.

§ 158. The agreement of parties within the realm, and British subjects, whereby the husband of an insane wife, joining with the committee of her estate, conveys her *choses in action* actually due her, which agreement is confirmed afterwards by private act of parliament, passes such *choses in action* fully to the assignee. *Cassell v. Carroll*,* 11 Wheat., 184.

§ 159. If the husband sues alone, as he may, for money to which he is entitled in right of his wife, and recovers, the property thereby vests in him, and the right of ownership in the wife is cut off; but if the husband and wife sue jointly, and the husband dies, the wife as survivor would take the benefit of the recovery. *Chappelle v. Olney*, 1 Saw., 409.

§ 160. The joining of the wife in the suit is held to be sufficient evidence of an intention on the part of the husband not to reduce the property to his own possession or recover it for the benefit of himself. *Ibid.*

§ 161. A legacy due the wife survives to her if the husband does not reduce it to possession. *Ibid.*

§ 162. And where husband and wife joined in a power of attorney, authorizing an agent to collect the legacy for the use of the wife, the receipt of the money by the agent during the life-time of the husband was not a reduction to possession. *Ibid.*

§ 163. In Virginia, the husband is entitled to his wife's reversionary interest to a chattel, upon the termination of the life estate; and he, or, if he be dead, his executor or administrator, may reduce to possession. *McClanahan v. Davis*,* 8 How., 170.

§ 164. Act of congress regulating the rights of married women in the District has not enabled a married woman to sue in her own name upon a chose in action which she had prior to the passage of the act, nor has it cut off the vested right of the husband to reduce it to possession. *Kimbrow v. First National Bank*,* 1 MacArth., 61.

§ 165. As to cotton acquired by the wife after marriage, before 1865, the right of ownership vests in the husband under South Carolina law. *Green v. United States*,* 7 Ct. Cl., 496. And so under the law of Georgia. *Reilly v. United States*,* 7 Ct. Cl., 504.

§ 166. Wife's real estate.—Husband entitled to rents and profits of whatever real property his wife owns, if not to her sole and separate use. *In re Brandt*, 5 Biss., 217.

§ 167. Though the husband is entitled to the profits of his wife's realty, his creditors get only such profits as are in excess of an amount which will fairly support the wife and family, that is, of course, provided she has no other property. *Ibid*.

§ 168. In Indiana the common law rule as to tenants "by entirety" has not been changed, except that the husband does not acquire any legal interest in the lands of the wife. *In re Benson*, 8 Biss., 116.

§ 169. The rents and profits of the land of a married woman mortgaged for her husband's debts, taken by the mortgagee before the sale, are her property and can be recovered of such mortgagee. *Semple v. Bank of British Columbia*, 5 Saw., 401.

§ 170. Where an insolvent husband lives in his wife's house with his family, needed repairs on the house are not in fraud of creditors. *Aliter*, perhaps, as to repairs beyond what are necessary and proper. *Dick v. Hamilton*, Deady, 885.

§ 171. The wife's property cannot in general be charged with improvements made upon it by the husband, unless the expenditure was made in fraud of creditors. *Ibid*.

§ 172. Lands of a *feme covert* held under the Oregon donation act were not separate estate until made so by the operation of the constitution of the state (art. 15, § 5), which went into operation in 1859. *Stubblefield v. Menzies*, 11 Fed. R., 371.

§ 173. Conveyance of wife's lands.—A parol contract to convey lands by a married woman is void *ab initio*. *Perry v. Mechanics' Mutual Ins. Co.*, 11 Fed. R., 480.

§ 174. In Oregon it is necessary, to constitute a valid conveyance of the real estate of a married woman, that it be conveyed by joint deed of husband and wife. *Elliott v. Teal*, 5 Saw., 251.

§ 175. A married woman can, by deed duly executed and acknowledged, bind her separate estate for the payment of a specified debt of her husband. *Stephen v. Beall*, 23 Wall., 329, (Conv., §§ 1186-89).

§ 176. In Massachusetts, a married woman may convey her estate by joining her husband in the conveyance, with the full effect of the English conveyance by fine and recovery. And where the deed is to the use of A. and B. during their joint lives, and to the use of the survivor in fee-simple, the uses are well raised and executed by the statute of uses. *Durant v. Ritchie*, 4 Mason, 45.

§ 177. Right of a *feme covert* to convey her estate is wholly statutory in Virginia and Kentucky. *Elliott v. Peirsol*, 1 Pet., 328.

§ 178. A conveyance of her land by a married woman passes no title, as in the case of parties under no legal incapacity, but she is presumed to act under the coercion of her husband, unless by acknowledgment before the authorized officer the contrary appears. *Hepburn v. Dubois*, 12 Pet., 345. And see *Dubois v. Hepburn*, 10 Pet., 1.

§ 179. Form of certificate, execution and acknowledgment of married woman's deed conforms to Pennsylvania law if substantial compliance appears by the certificate. *Talbot v. Simpson*, Pet. C. C., 188.

§ 180. The separate examination of a married woman is indispensable in a conveyance, but the officer's acknowledgment need not use the precise words of the statute. *Raverty v. Fridge*, 3 McL., 245.

§ 181. Substantial compliance with the statute requiring the private examination of a wife who acknowledges her deed is sufficient, though the certificate says "apart from and out of the hearing of" her husband, instead of following the words of the statute, "out of the presence of" the husband. *Deery v. Cray*, 5 Wall., 795.

§ 182. A deed for the conveyance of her land, executed by a married woman without being privily examined, as the law requires, is defective in its acknowledgment, and chancery cannot direct an amendment of the deed entered upon record to perfect the purchaser's title. *Elliott v. Peirsol*, 1 McL., 11.

§ 183. Law of Illinois regarding the conveyance of land by married woman considered. Where the wife executes the conveyance with her husband, purporting to convey the estate, but acknowledges it as in substance a mere relinquishment of dower, the deed does not convey her estate. *Lane v. Dolick*, 6 McL., 200.

§ 184. Where a certificate of acknowledgment runs that both husband and wife appeared, and that the wife acknowledged separate and apart, etc., but the husband alone signed the deed, and the wife was only named in the dower clause, and such acknowledgment does not show that the husband actually acknowledged the deed, the deed as to the husband is defective. *Hinde v. Longworth*, 11 Wheat., 199.

§ 185. The Virginia act which makes unrecorded deeds void as to creditors and subsequent purchasers means creditors of and subsequent purchasers from the grantor. A marriage settlement conveying the wife's land and slaves to a trustee, to which the husband was a party, protects the property from the creditors of the husband. *Pierce v. Turner*, 5 Cr., 154.

§ 186. A curative act of the legislature, providing that deeds of conveyance made by married women shall not be void because of a defective acknowledgment, is not objectionable under the constitution of the United States. Whether it violates the state constitution, *quære*. *Watson v. Mercer*, 8 Pet., 88.

§ 187. A mortgage deed of her separate lands, executed in blank by a wife for the husband's benefit, with neither the mortgagee's name nor the sum borrowed inserted, but left to be filled up by the husband, is voidable by the wife even as against a mortgagee who *bona fide* loans upon the security and receives the instrument filled up by the husband accordingly. *Minnesota laws construed*. *Drury v. Foster*, 2 Wall., 24 (CONV., §§ 883-88).

§ 188. A widow, by re-acknowledging a deed which she improperly executed while a married woman, gives it full force and validity. *Riggs v. Boylan*, 4 Biss., 445.

§ 189. Husband of tenant in common.—The husband of a tenant in common, who buys an outstanding equity in the land, takes it as trustee for his wife and her co-tenants. *Rothwell v. Dewees*, 2 Black, 618.

As to executing deeds by way of releasing dower, and curative acts, see §§ 504, 505, 545-551.

As to deeds of wife who is also an infant, see §§ 857, 916.

And as to rights upon abandonment, see SEPARATION AND DIVORCE, *post*.

3. Wife's Separate Property.

SUMMARY.—*How separate estate is created*, §§ 190-201.—*Dominion over separate property*, §§ 194-206, 218.—*Husband's participation*, §§ 207-210.—*Liability for necessities, etc.*, §§ 211, 212.

§ 190. To create a separate estate in a *feme covert* no particular phraseology is essential; but the intent of the parties is the controlling test. *Prout v. Roby*, §§ 214-18.

§ 191. A lease to a person in trust for a married woman, with power in her to dispose thereof by will, creates in her a separate estate, and debars the husband accordingly. *Ibid*.

§ 192. New Jersey statutes bearing upon the wife's separate property rights stated. *Alldridge v. Muirhead*, §§ 219-21.

§ 193. The law of New Jersey regards lands, paid for with the money of a married woman raised upon loans made directly to her, as separate property and exempt from liability for her husband's debts. *Ibid*.

§ 194. Rule of Alabama as to the wife's equitable and statutory separate estate stated. The wife cannot mortgage such estate for her husband's benefit. *Lippincott v. Mitchell*, §§ 222-23.

§ 195. A conveyance of lands in Alabama to a married woman, to have and hold for "the sole and proper use, benefit and behoof of her, her heirs and assigns forever," gives her a separate estate, and the mortgage thereof by herself and husband to secure payment of his debts is, under the statute, void. *Ibid*.

§ 196. Where proceedings are brought in order to get possession, under a deed of trust and lease, and the wife of the defendant sets up her separate estate, and that she never authorized the trust nor executed the deed in form, she should be admitted as a party to the suit. *Chaffe v. Oliver*, §§ 224-26.

§ 197. A conveyance to a married woman to "vest in her a separate property under the laws of Arkansas" gives her a separate estate, free from the control and liabilities of her husband. The conveyance having been recorded, the husband's subsequent execution of a deed of trust and lease to A. is null as against her. *Ibid*.

§ 198. Common law right of husband in his wife's lands, whether affected by the Oregon constitution of 1859. An ordinary deed of land to a married woman, and to her heirs by her present husband, does not create a separate estate. *Starr v. Hamilton*, §§ 227-31.

§ 199. The constitution of Oregon of 1859 creates a separate estate of land in the wife, so far at least as third parties are concerned. This provision did not operate retroactively so as to divest rights already vested in the husband; but as to lots of land conveyed to the wife, after the constitution went into force, the rule of the wife's separate property applies. *Ibid*.

§ 200. Connecticut statute of 1872 stated, relative to suits against married women. For what debts the separate estate of a married woman is liable in equity also considered; and differences pointed out under the act of 1868 between the wife's statutory estate and her equitable sole and separate estate. *Williams v. King*, §§ 232-235.

§ 201. Subscriptions for stock in the wife's name, made by the husband acting as her attorney, *held* to constitute separate property, under Connecticut laws, in such sense that a promissory note, signed by her alone in consideration of such stock, bound the property, and might be sued upon. *Williams v. King*, §§ 232-36.

§ 202. Legislation upon married women's property rights in the District of Columbia considered; and *held* that, where a married woman had an inchoate dower interest in certain real estate which her husband and A. owned as tenants in common, and released this dower interest in consideration of a certain sum for which they gave her their joint note, she might sue A. alone upon the note when it matured. *Sykes v. Chadwick*, §§ 237-41.

§ 203. A married woman's contracts, when necessary to the proper use and enjoyment of her separate estate, are binding at law. Equity will enforce debts expressly contracted upon the credit of such separate estate, or when the consideration goes to its benefit, but not a debt by indorsement for another's benefit, which is not expressly made a charge upon her separate estate by her written instrument. *Flanders v. Abbey*, §§ 242-43.

§ 204. A married woman may, with her husband's consent, take land by purchase, and a security given thereon by her for the purchase money will be enforced in equity. And where the conveyance reserves a lien for the purchase money and ten per cent. interest, that rate being lawful in the state between parties *sui juris*, this lien is valid against her. *Bedford v. Burton*, §§ 244-45.

§ 205. A trustee *ex malificio* must refund all that he has received under a contract before he can be permitted to rescind it. How far this rule applies in Texas to infants and married women, considered. *Slaughter v. Glenn*, §§ 246-48.

§ 206. The law of Texas regarding the separate real estate of married women stated; and *held*, that it is not indispensable that the husband shall join in the conveyance thereof, nor that the forms prescribed by statute be strictly followed. *Ibid.*

§ 207. Where a husband borrows or uses his wife's money for his individual purposes, he becomes equitably indebted to her and may secure her by payment or pledge, or in any other proper way. *Friedlander v. Johnson*, §§ 249-51.

§ 208. The statute of Mississippi which declares that where a husband holds in his own name property of his wife he holds it in trust for her, but that such trust is void as against creditors of the husband who contracted or gave credit in consequence of the possession of such property, without notice of the trust, protects only creditors who gave the husband credit with special reliance on that particular property. *Ibid.*

§ 209. Where a husband joined his wife in executing a conveyance to her separate use, and with her acknowledged it before the proper officer, and himself recorded it in the appropriate office, but retained it in his own possession, though where it was equally under her dominion, and declared repeatedly that it was intended as a complete provision for her, *held*, that there was a sufficient delivery of the deed, and that the trust was valid, notwithstanding the trustee named in the deed did not learn of its execution till long after it was recorded, and, when he did, refused to act, and the husband himself, he and his wife being divorced after execution of the deed, denied its validity. *Adams v. Adams*, §§ 252-53.

§ 210. Common law of husband and wife, with reference to the wife's property, compared with the married women's legislation in Mississippi. *Bank of America v. Banks*, §§ 254-60.

§ 211. A married woman, under Mississippi statutes, may rent her land to any one, her husband included. Her separate estate is not bound for supplies furnished for such premises while leased to her husband and cultivated on his account, and the creditor who furnishes such supplies must ascertain at his own peril on whose account the premises are cultivated. *Ibid.*

§ 212. A wife's separate estate is not liable for food and raiment of the family. *Bank of America v. Banks*, § 259.

§ 213. The law of estoppel relating to married women applied; and *held* that a married woman is not estopped by her recitals in a deed. *Ibid.*

[NOTES.—See §§ 261-305.]

PROUT v. ROBY.

(15 Wallace, 471-477. 1872.)

APPEAL from the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—On the 14th of April, A. D. 1820, William Prout, the ancestor of the appellant, leased to Jonathan Porter, as trustee for Jane Mallion, the premises described in the bill. The lease was for the term of ninety-nine years, and was renewable for successive terms of that duration forever.

Rent amounting to \$25.80 was to be paid at the end of each succeeding year while the lease should subsist. It was stipulated that if the rent should at any time be due and unpaid for the period of sixty days, and there should not be sufficient property upon the premises wherefrom to make the amount due by levy, the lessor, his heirs or assigns, might re-enter and hold the premises as if the lease had not been executed. It was further stipulated that if Porter, as such trustee, or Jane Mallion, her heirs or assigns, should *at any time* thereafter pay to the lessor, his heirs or assigns, the sum of \$430 over and above the rents then due, the lessor, his heirs or assigns, should thereupon execute to Jane Mallion; her heirs or assigns, a deed of release for the leasehold premises. There was a further provision that Jane Mallion might dispose of her interest in the premises by will, and that the will should pass the title which she held, subject to the conditions and requirements of the lease, in favor of the lessor, his heirs and assigns. The bill alleges that Jane Mallion left but one child, Mary Ann Roby, her only heir-at-law, who was the original complainant in this litigation. Porter died many years before this bill was filed. It does not appear that he left any heir, or that there has ever been any legal representative. Prout, the lessor, also died many years ago. The appellant holds title to the leasehold premises by descent and partition.

Upon the death of Jane Mallion, Vandora Mallion, her husband, who survived her, assumed the possession and control of the property and received the accruing rents down to his death, which occurred in February, 1853. He devised all his property, real, personal and mixed, to the Reverend Edward Knight, now also deceased. Knight claimed and possessed the leasehold estate under the will, and received the rents until a subsequent period, when he abandoned the possession thus acquired. At a later period the appellant entered into possession and has since received the rents and appropriated them to his own use. The bill prays for an account, that the appellant be credited with the stipulated rent and the stipulated purchase money, and, if the rents and profits which he has received exceed the amount of these items, that he be decreed to pay the surplus and convey the premises; and if the rents and profits received fall short of his credits, that then, upon payment of the amount of the difference, he be decreed to convey. The defendant answered, and testimony was taken by both parties. The complainant died *pendente lite*, and her son and only heir-at-law, John T. Roby, was made complainant in her place by a bill of revivor. The defendant denied that Mary Ann Roby was the child of Jane Mallion. The court below ordered this question to be submitted to a jury in the proper court of law, and that both parties should be at liberty to read upon the trial all the depositions taken in the case pertinent to the issue. The jury found for the complainant, and the verdict was certified back to the equity court. It does not appear that any motion was made by the appellant in either court for a new trial, nor does it appear whether any evidence in addition to that specified in the order of the court was or was not given to the jury. The equity court decreed for the complainant, and the defendant thereupon removed the case to this court by appeal.

§ 214. *To create a separate estate in a feme covert no particular phraseology is essential; but intent controls.*

No particular phraseology is necessary to create the provision for a *feme covert* technically designated in the law as her *separate estate*. As in all other cases of instruments to be construed, the controlling test is the intent of the parties. That, in whatever language it may be clothed, constitutes the contract.

§ 215. — *a lease to a person in trust for a married woman, with power in her to dispose thereof by will, creates in her such separate estate and debars the husband.*

Here the meaning is so clear that no room is left for doubt. The intervention of the trustee and the power of disposition by will could have had no purpose but to give to the *cestui que trust* the same power over the lease as if she had been a *feme sole*, and to place it beyond the reach and control of her husband both during her life and after her death. These facts are irreconcilable with any other view of the subject. No interest in the lease could vest in the husband without some act on her part in his favor. No such act was done. His assumption of control over the premises after her death was simply usurpation, and no right or title passed under his will to his devisee. What he did and what Knight did may therefore be laid out of view, as of no legal consequence in the case. It is not shown that there is, or ever was, any personal representative of Jane Mallion. The maxim applies that what does not appear is to be presumed not to exist.

§ 216. *Objection not taken until after verdict found below, held unavailable on appeal.*

It is insisted by the counsel for the complainant that the proofs are insufficient to establish the heirship of Mary Ann Roby. It was competent for the court which tried the issue, and for the court which ordered it to be tried, to set aside the verdict and award a new trial, or the latter court might at the hearing have disregarded the verdict if it were proper to do so, and it is within the power of this court to do the same thing. 2 Daniell's Ch. Pr. (Metcalf's ed.), 1147, notes 8 and 10. But it does not appear that the appellant objected to anything that occurred during the progress of the trial, nor that he took any action in either court touching the verdict after it was found, nor does it appear what evidence, oral or otherwise, was before the jury. The court having decreed according to the finding, we think the appellant should be held concluded, and that under the circumstances we ought not to go behind it in our examination of the case. The testimony in the record fails to satisfy us that the verdict ought to be disregarded. The objection comes from the party called upon to convey, under the covenant of one with whom he is in privity of blood and estate. If Mary Ann Roby were not the heir-at-law, the true heirs, whenever they appear, not being parties, will not be affected by this litigation.

§ 217. *A covenant to convey whenever a certain sum be paid, contained in a lease of the separate estate of a married woman, passes to her heirs; effect of improper re-entry considered.*

The re-entry of the appellant cannot avail him. If there had been a personal representative of Jane Mallion after her death, the title to the leasehold term, being personalty, would have passed to and vested in him. There being no such representative, it fell into abeyance, and has since so continued. The covenant to convey passed by descent to the heir-at-law, as if it had been contained in a separate instrument. If there had been a personal representative with sufficient assets, the heir could have called upon him to pay the purchase money. Chitty on Descents, 10, 13, 250; Platt on Covenants, 514; Fry on Specific Performance, 103; Seton v. Slade, 7 Ves. Jr., 279, note; Daniels v. Davison, 16 id., 253, note. In that event the personal representative would have been a necessary party. But the heir asks no such relief. He proposes to make payment *aliunde*. Hence there is no necessity for the presence

of an administrator. If the covenant had been to convey, upon the payment of the purchase money during the life of the lease, putting an end to the lease would have destroyed the covenant. But the covenant is to convey whenever the purchase money should be paid. In such cases the conveyance may be demanded at any time, and the existence or non-existence of the lease when the demand is made is immaterial to the rights of the parties. 1 *Shepherd's Touchstone*, 169. But if the covenant were different in this particular from what it is, and belonged to the class first mentioned, the result would be the same. The re-entry was without effect. *Connor v. Bradley*, 1 How., 217, was a case arising in the city of Washington, under a lease of the same lessor, and identical as regards the right of re-entry with the one here under consideration. It was there said that the statute of 4 George II., ch. 28, was in force in the county of Washington. Upon examination that statute is found to contain nothing applicable to this case.

§ 218. *Where a right of re-entry is claimed for non-payment of rent, there must, under the common law, be proof of a sufficient demand.*

This leaves the rights of the parties to be determined by the common law. In that case this court said: "It is a settled rule at the common law, that where a right of re-entry is claimed on the ground of forfeiture for the non-payment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset upon the day when the rent is due, upon the land, at the most notorious place of it, though there be no person on the land to pay." The legal propositions thus stated are fully sustained by the authorities. *Coke*, Lit., 201, B.; 1 *Saund.*, 287, n. 16; *Wheeldon v. Paul*, 3 Carr. & P., 613; *Smith v. Whitbeck*, 13 Ohio St., 471; *Taylor's Landlord and Tenant*, § 493, note 6.

In this case it is not shown that any demand was ever made upon the premises. It is in proof that an officer went there twice to distrain for rent in arrear, and that he did not find sufficient property to satisfy the costs, but when this occurred, and what amount of rent was then claimed to be in arrear, is not disclosed. This testimony is wholly immaterial. If the requirements of the law had been complied with, or if the appellant had enforced the forfeiture by a recovery in ejectment, upon tender of the amount due with interest and costs at the proper time, relief would have been given; in the former case in equity by injunction, and in the latter by motion and stay of execution. 2 *Story's Eq.*, §§ 1315, 1316; *Wadman v. Calcraft*, 10 Ves. Jr., 68; *Hill v. Barclay*, 18 id., 63. Where it is necessary to take an account between the parties, no tender need be made before bringing the bill. *O'Mahony v. Dickson*, 2 Sch. & Lef., 400; *O'Connor v. Spaight*, 1 id., 305. This subject was fully examined in *Sheets v. Selden*, 7 Wall., 420.

The appellant is entitled to be paid the rent in arrear and the amount of his expenditures for taxes, both with interest, and the purchase money, before he can be required to convey. All this we understand to be carefully provided for in the decree of the court below. The directions for taking the account are clear and explicit. The appellant is entitled to nothing more.

Decree affirmed.

ALDRIDGE v. MUIRHEAD.

(11 Otto, 397-408. 1879.)

APPEAL from U. S. Circuit Court, District of New Jersey.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This is a suit in equity brought by the assignée in bankruptcy of Thomas Aldridge, to reduce to his possession, as part of the estate, property standing in the name of Anne Aldridge, the wife of the bankrupt. The theory of the bill is that the bankrupt, while largely indebted, purchased the property in controversy with his own means, and took the title in the name of his wife to keep it away from his creditors.

§ 219. *New Jersey statutes, bearing upon the wife's separate property rights, stated.*

New Jersey has been among the most liberal of the states in modifying the rules of the common law, prescribing the rights of the husband in the property of his wife, and in protecting her against the claims of his creditors. In 1851 a widow was given the right to demand from the personal representative of her deceased husband, all personal property which at or immediately before her coverture belonged to her, or which came to her during coverture by bequest, gift or inheritance, if it remained in his possession at the time of his death. Laws of 1851, p. 201. In 1852 it was enacted that a married woman might receive by gift, grant, devise or bequest, and hold for her sole and separate use, real and personal property, and the rents, issues and profits thereof, and that her sole and separate property should not be subject to the disposal of her husband or liable for the payment of his debts. Laws of 1852, p. 407. In 1857 married women were authorized to bind themselves by covenants in conveyances of their lands, provided their husbands joined with them in the deed (Laws of 1857, p. 485), and in 1862 it was enacted that if a married woman transacted business or purchased property, and thereby contracted debts, she might be sued at law for the recovery of the amount, and that any judgment thus obtained should bind her property. Laws of 1862, pp. 271, 272.

It is conceded by the counsel for the appellee that the circuit judge expressed the law of the state accurately when he said in his opinion, filed with the record, that "the courts of the state, in numerous decisions, have construed it (the act of 1852) to authorize the acquisition by a married woman of personal property and real estate, and to intercept the common law right of her husband to reduce her personal property to possession, and to appropriate the rents, issues and profits of her real estate as an incident of his initiate estate by the curtesy." Another principle stated by the circuit judge is also conceded to be correct. It is as follows: "When, therefore (in New Jersey), the title to real estate is conveyed to a married woman, she must be considered the *bona fide* owner of it, as if she were a single female. But it must be intrenched in the real good faith by which an honest acquisition is distinguished. If it is purchased by her or for her, no matter by whom, and is paid for out of her separate estate, its validity cannot and ought not to be questionable. But if she has no separate estate, or that is disproportionately small compared with the consideration ostensibly furnished by her, and her means are materially supplemented by her husband's contribution from resources, whether money or its equivalent, which he could not rightfully so apply, such a transaction does not specially invite, as it certainly does not deserve, any legal sanction." It is equally true that a husband may manage the separate property

of his wife without necessarily subjecting it or the profits arising from his management to the claims of his creditors. *Voorhees v. Bonesteel*, 16 Wall, 16.

§ 220. *Facts of case further stated.*

Such being the law of the case, we come now to consider the facts. Mr. and Mrs. Aldridge, the appellants, were married in 1842. The wife had at the time money and personal property amounting to about \$1,000, which came to her by inheritance from a deceased relative. The most of this was invested soon after in furniture for the home of the family. The husband was an instrument maker by trade, but at some time before 1857 left that business and engaged in the manufacture of oakum. In 1857 his factory was burned, and being unable to collect his insurance money, on account of the insolvency of the company in which his property was insured, he failed and became utterly insolvent. After giving up all his property to his creditors, he remained largely in debt. Confessedly in the early part of 1861 he had nothing. In May of that year he was appointed postmaster at Hudson City, New Jersey. The emoluments of this office were then considerably less than a thousand dollars a year. He was also a real estate agent and conveyancer.

During that year Mrs. Aldridge received about \$400 from her father's estate in England. In September a friend of the family had a lot for sale with a barn on it. The price was \$350 and the terms easy. A purchase of this lot was made in the name of the wife. Not more than \$25, if that, was paid down. The balance of the purchase money was secured by assuming a mortgage already on the lot for \$250, and giving another mortgage, in which the husband and wife joined, for \$75. Mrs. Aldridge, with the money she had received from her father's estate, and more which she borrowed from a maiden sister, converted the barn on the lot into a house. The cost of this was between ten and twelve hundred dollars, and the house was occupied by the family as a residence until 1869, when it was sold with the lot for something more than \$4,000.

In the course of the years 1863 and 1864, some female friends of Mrs. Aldridge, countrywomen of hers, loaned her nineteen hundred dollars — one furnishing seven hundred and the other twelve hundred dollars. She also borrowed further sums from her sister, who was frequently an inmate of the family, and seems to have had money. The precise sum got from her sister does not appear, but the evidence leaves no doubt in our minds that with this and the other sums borrowed she had, as her separate capital, more than \$3,000.

During the years 1863, 1864 and 1865, five different purchases of property were made in her name. The aggregate of all these except the last was only a little more than \$3,000, and credit was given on much of the purchase money. Some sales were made in the meantime, and a little profit realized. The last of the five purchases was made in January, 1865. The money needed to make up what was wanted for the down payment was raised by a mortgage of one of the previous purchases. The property embraced in the last purchase was sold in the early part of 1866, and a profit of nearly \$4,000 realized. Many other purchases were made afterwards, but it is conceded that the money to make the payments came directly or indirectly from the returns of this last fortunate transaction.

While it may not be in all cases quite clear from what particular source the money came that was used in paying for each one of the earlier purchases, the testimony leaves no doubt with us that, as a whole, they were paid for from the loans made to the wife by her sister and friends, and that all the

property she now has is the result of a judicious employment of the capital she thus acquired and its legitimate profits. While the negotiations were all made by the husband, the titles were openly taken in the name of the wife. The appellants were called on to answer whether the purchase money, or any part of it, was paid from the means of the husband, and they stated, under oath, most unequivocally, that it was not. This throws the burden of proof on the complainant, and after a full and careful examination of the whole case, we are unable to find that anything which the creditors of the bankrupt could have subjected to the payment of their debts ever went into the property that the wife now holds. Undoubtedly the husband's services were largely the cause of the fortunate results; but so far as we have been able to discover, they were devoted to the management of what was both in law and in fact her separate property. Her accumulations from that source do not belong to his creditors.

To our minds it is an important element in this case that the transactions out of which this suit arose commenced thirteen years, or thereabouts, before any attempt was made to impeach them. They were always open, and no effort at concealment was ever made. All deeds were taken in the name of the wife and promptly put on record. The husband's connection with all the purchases and sales must have been well known. The character of his own business must also have been understood. His bank accounts show that he was a large daily depositor in his own name. His checks were numerous and sometimes for considerable amounts. He seems sometimes to have been employed in the course of his business as land agent by heavy property owners. All his debts must have been contracted as early as 1857, and he was not adjudged a bankrupt until 1873. During all the time between these dates it is not shown that any one ever attempted to interfere with his own business or to reach the property in the name of his wife, some of which she had held six or seven years. This can be explained in no other way than upon the assumption that the creditors knew the money he was depositing was not to any considerable extent his own, and that his transactions in the name of his wife were in fact what they purported to be, the result of a judicious management of her separate estate. After such delay we are not inclined to set aside what has been permitted to remain so long undisturbed, simply because of an inability to explain with exact certainty from what precise source the money came which went into the purchase of each particular parcel of property. It is sufficient for the purposes of this case that, with the money Mrs. Aldridge borrowed from her sister and friendly countrywomen, and the profits of her several investments, she had enough of her own, which was her separate estate, to make herself the owner of all she now has without interfering with the just rights of her husband's creditors. The consideration ostensibly furnished by her is not more than we are satisfied she had, and her means were not materially supplemented by contributions from her husband's resources that in law belonged to his creditors. Such services as he rendered in her behalf were no more than were consistent with all the obligations he was under to those to whom he was indebted, and there is no evidence to satisfy us that his own money was used to make any of the payments of purchase money.

§ 221. *The law of New Jersey regards lands paid for with the money of a married woman, raised upon loans made to her, separate property and exempt from liability for her husband's debts.*

That the several loans which made up the capital invested were to the wife, and not to the husband, is to our minds entirely clear. The insolvency of the

husband was well understood, and it is evident from all the circumstances that the friends who made the loans would never have done so had it not been supposed that the money was to be used for the benefit of Mrs. Aldridge, and that she and her estate were to become bound for the repayment. The laws of New Jersey authorized her to contract such debts, and made her separate estate liable therefor. The signature of the husband to the notes and mortgages did not necessarily make the money or the property for which they were given his. It perfected the obligation of his wife and subjected her property to liability, but did not transfer her separate estate to him. Unless his means were actually used to pay her debts, his creditors have lost nothing they ever had a right to claim as in law or equity belonging to them. *Conrad v. Shomo*, 44 Pa. St., 193; *Brown v. Pendleton*, 60 id., 419. As he was at the time hopelessly insolvent, it cannot for a moment be supposed that credit was given to his personal obligation. The wife and her separate estate furnished the only security the parties supposed they had for the money which was loaned.

We have thought it unnecessary to go over the details of the evidence in an opinion. The result we have unanimously reached is that the decree below should be reversed and the cause remanded with instructions to dismiss the bill with costs. It is consequently so ordered.

LIPPINCOTT v. MITCHELL.

(4 Otto, 767-772. 1876.)

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This case is brought here by appeal from the circuit court of the United States for the southern district of Alabama. It depends for its determination upon a branch of the local law of real property. The question involved relates to the separate estates of married women. The facts are undisputed. The premises in question were conveyed to the appellee, Nannie C. Mitchell, by deed duly executed, bearing date on the 19th day of March, 1868.

On the 17th of February, 1869, Nannie C. Mitchell and J. C. Mitchell, her husband, mortgaged the premises to the appellants, J. B. Lippincott & Company, to secure the payment of certain liabilities therein described. The instrument contained a power of sale. The mortgagees advertised the property to be sold pursuant to the power. She thereupon filed this bill to enjoin the sale, upon the ground that under the law of Alabama she was incompetent thus to incumber the property, and that the mortgage was therefore void. The circuit court decreed a perpetual injunction. The mortgagees thereupon removed the case to this court by appeal.

§ 222. *Rule of Alabama as to wife's separate estate stated. Wife cannot mortgage for her husband's benefit.*

The code of Alabama, art. 3, sec. 2371, declares that "all the property of the wife, held by her previous to the marriage, or which she may become entitled to after the marriage in any manner, is the separate property of the wife, and is not subject to the payment of the debts of the husband."

Prior to the judgment of the supreme court of the state in 1869, in *Molton v. Martin*, 43 Ala., 651, it was the settled law in that state that there were two distinct kinds of separate estates,—one designated equitable and the other statutory. With respect to the former, the rule was that it was wholly independent of the statute. It was as if the statute did not exist. The rights

of the husband were excluded, but the powers of the wife might be defined and limited by the instrument conveying it, as was deemed proper by those concerned. If no limitation was imposed, they were regulated by the general rules of equity jurisprudence upon the subject. According to those rules, where there was no restriction she was in effect a *feme sole* as to such property. She could incumber or dispose of it at pleasure. The income belonged to her, and she was not bound to contribute out of it anything for the support or benefit of the husband's family. *M. Church v. Jacques*, 3 Johns. Ch., 77; *Gun v. Samuels*, 33 Ala., 201; 2 Story's Eq., secs. 1392, 1393.

She stood, with respect to such property, in the same relation to the husband as if it belonged to a stranger. She had, therefore, the same capacity as any other person who might be the owner to mortgage it for his debts. The creation of such conventional estates was sustained because there was nothing in them contrary to law or public policy. The parties concerned were, therefore, permitted to contract as they pleased.

But where no such separate estate existed with respect to property owned by the wife at the time of the marriage, or acquired subsequently, the statute interposed and created a separate estate in her behalf, with such incidents and attributes as the legislature saw fit to prescribe. Among these were the right of the husband to control the property and receive the income without accounting for it, and the liability of the estate for articles of support and comfort procured for the use of the family suitable to its condition in life, for which the husband would have been liable according to the common law. If he survived her, and she died intestate, he was entitled, as distributee, to one-half of her personalty, and to the use and enjoyment of her real estate for life. If she survived him, the value of her separate estate was deducted from her distributive share of his personalty and her dower. But she could not mortgage the estate for her husband's benefit, and such mortgages were of no validity.

The judgment of the court in *Molton v. Martin*, *supra*, and in *Glen v. Glen*, 47 Ala., 204, and in *Dennichand v. Berry*, 48 id., 591, the two latter following and controlled by the former, abolished the distinction between the two classes of separate estates, and brought all such equitable estates, except where the legal title was vested in a trustee, within the statute. It followed as a consequence that the wife could no more mortgage an equitable than a statutory separate estate for the husband's benefit, and that all such mortgages were void, by reason of her disability in both cases.

Such was the state of the law when the present case was decided by the circuit court. The conclusion reached was inevitable, whether the separate estate of the wife belonged to one class or the other, the question then being immaterial in the jurisprudence of the state. The result, as to the point under consideration, was necessarily the same in both cases.

The subject again came under the consideration of the supreme court of the state in 1875, in *Short v. Battle*, 52 Ala., 456. It was ably and elaborately examined. The court unanimously overruled the cases of *Molton v. Martin*, *Glen v. Glen*, and *Dennichand v. Berry*. The pre-existing state of the law was re-asserted and re-established. The statute was construed as it was construed before *Molton v. Martin* and the subsequent cases in harmony with that case were determined. This construction is a rule of property of the state, and we are as much bound by it as if it were a part of the statute. It is our duty to apply the law of the state as if we were sitting there as a local

court, and this case were before us as such a tribunal. *Leffingwell v. Warren*, 2 Black, 599; *Olcott v. Bynum*, 17 Wall., 44.

§ 223. *Conveyance of lands in Alabama to married woman's sole use and benefit, held to give her a separate estate; mortgage of it by herself and husband, to secure payment of his debts, is void.*

We are thus brought to the examination of the question whether the estate to which this litigation relates belongs to the equitable or to the statutory class. If to the latter, the decree of the circuit court is correct; if to the former, it must be reversed. No particular words or phrases are necessary to create an equitable separate estate. The court will examine the whole instrument, and look rather to the intent manifested than to the language employed. The creative intent must clearly appear. Doubts are resolved in favor of the husband's marital rights. Bish. Law of Married Women, sec. 824. In *Short v. Battle*, *supra*, the supreme court of the state laid down this rule: "Where the intent to exclude the marital rights of the husband is doubtful or equivocal, or rests on speculation, the statute intervenes and fixes the character of the estate as the separate statutory estate of the wife."

The deed here in question purports on its face to be executed by "Huriosco Austill, trustee for Mrs. Mary A. Marshall," recites that the sale and conveyance were made pursuant to her written request, and then proceeds: "Now, know all men by these presents, that I, Huriosco Austill, as trustee, as aforesaid, for and in consideration of the sum of \$4,600, lawful money of the United States, to me in hand paid by Nannie C. Mitchell at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said Nannie C. Mitchell, her heirs, executors and administrators forever, released and discharged from the same, have granted, bargained, sold, aliened, remised, released, enfeoffed, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, enfeoff, convey and confirm, to the said Nannie C. Mitchell, her heirs and assigns forever, all and singular that certain lot of land situate, lying and being in the city of Mobile, and described as follows, to wit:

"Together with the tenements, hereditaments, rights, members, privileges and appurtenances unto the above mentioned premises belonging or in any way appertaining: to have and to hold the above granted and described premises with the appurtenances unto the said Nannie C. Mitchell, her heirs and assigns, to the sole and proper use, benefit and behoof of the said Nannie C. Mitchell, her heirs and assigns forever."

If it were intended by this deed to give the wife a separate estate, it is remarkable that in the mass of redundant verbiage employed no words clearly apt for that purpose are to be found. It is remarkable, if such an intent existed, that the phrase, "for her separate use," or "for her exclusive use," or "free from the control of her present or any future husband," or some equivalent for one of them, was not inserted. The omission can only be accounted for upon the hypothesis that the idea of a separate estate was not in the mind of either of the parties, and that hence no instruction upon the subject was given to the draftsman of the deed. There is nothing in the record to warrant the belief that the purchase and conveyance were not intended to be such a transaction in the ordinary way, without securing to the grantee any special rights touching the property, or any right other than that of the ownership in fee-simple.

The only part of the deed which gives a shadow of support to the proposition of the appellants is the language of the *habendum*. The same language is to be found in many precedents in books of forms, where, certainly, there was no purpose to create a separate estate. Thus, in Oliver on Conveyancing, an American work, in the form of a deed by an administrator, p. 290, the *habendum* is, "To have and to hold the same to the said J. C. and W. W., their heirs and assigns, to their sole use and behoof forever." So, in the form of a deed to a corporation, id., 279, "To have and to hold the same, with the appurtenances thereof, to the said corporation and their assigns, to their sole use and behoof forever." Instances to the same effect in other like works might be largely multiplied.

Such was also the ancient English form of the *habendum*, except that the term "only" was used instead of "sole." In Lilly's Practical Conveyancer, published in 1719, in the form of a release in fee, the *habendum* is, "To have and to hold the said," etc., "to the only proper use and behoof of the said C. C., his heirs and assigns forever." And such is the modern English form. Thus, in the form of a deed of feoffment, in 4 Blythewood, 130, the *habendum* is, "To have and to hold the said close," etc., "to the only proper use of the said [feoffee], his heirs and assigns forever."

We have examined the cases upon the subject, referred to by the learned counsel for the appellants, and many others, both the English and American. Some of them go to a very extreme length in one direction, and some in the other. Not a few of them are in irreconcilable conflict. To examine and discuss them in detail would unnecessarily prolong this opinion and could serve no useful purpose. We therefore forbear to remark further in regard to them. Without the aid of the rule of doubt recognized by all the authorities upon the subject, we have no difficulty in coming to the conclusion that the deed of Austill cannot be held to have vested in the grantee a separate estate, or any other estate than a fee-simple. When she executed the mortgage she had, therefore, a statutory separate estate. Hence the mortgage was void.

Decree affirmed. (a)

MR. JUSTICE STRONG dissented.

CHAFFE & BRO. v. OLIVER.

(Circuit Court for Arkansas: 1 McCrary, 626-629. 1880.)

STATEMENT OF FACTS.—Mrs. Oliver owned lands as a separate estate, which her husband conveyed in trust to secure his debt, taking a lease. She joined in the deed, but her acknowledgment was defective. After a sale under the deed of trust Oliver attorned to the purchaser, but in order to get possession an action of unlawful detainer was brought against Oliver, whereupon Mrs. Oliver filed her petition to be made a defendant, setting up her separate estate, and that she never executed and acknowledged the deed of trust, etc., or authorized or assented to it.

§ 224. *The wife's acknowledgment being fatally defective, etc., she should be admitted to the suit.*

Opinion by CALDWELL, J.

The learned counsel for the plaintiffs concede Mrs. Oliver's acknowledgment of the deed of trust is fatally defective. On the showing made, Mrs. Oliver ought to be admitted to defend the suit. *Lewis v. Brewster*, 57 Pa. St.,

(a) Affirming *Mitchell v. Lippincott*, * 2 Woods, 487.

410; *Johnson v. Fullerton*, 44 Pa. St., 466; *Gantt's Digest*, §§ 4481-2. In the deed conveying the lands to Mrs. Oliver, the grantor declares the conveyance is "a gift of said lands which I make to my daughter as a portion of my estate, hereby intending to vest in her a separate property under the laws of Arkansas."

The grantor obviously intended to limit the estate to the separate use of Mrs. Oliver. This intention is expressed in terms, and the use of the word "separate," according to the modern English authorities, is sufficient of itself to exclude the marital rights of the husband. *Bispham's Eq.*, § 100; 2 *Perry on Trusts*, §§ 647, 648; 1 *Bishop on Married Women*, §§ 817, 824. The deed to Mrs. Oliver does not in terms pursue the language of section 8, chapter 111, of *Gould's Digest*, but that is not necessary; that act was intended to extend and enlarge the rights of married women to their separate property, and restrict the common law rights of the husband in the wife's property.

§ 225. *Under Arkansas statute the wife had a legal title to the land in question.*

It certainly was not intended by that act to restrict the operation of the existing and well settled rules of equity by which a wife was secured in the separate use of her property, and to declare that a conveyance that, by its terms, was in equity sufficient to limit the estate to the separate use of the wife, should no longer have that effect. Any language in the deed which, prior to the passage of this act, would have been effectual to limit the estate to the separate use of the wife, was still effectual for that purpose after the passage of the act. 2 *Bishop on Married Women*, §§ 90-92.

In the absence of this statute, Oliver would, in equity, have held these lands as trustee for his wife. Under the statute both the legal and equitable titles were united in her, and, in the language of the act, she was possessed of them "in her own right and name, and as of her own property." In a word, she was invested with the legal title, freed from the marital rights of her husband and the claims of his creditors. *Howell v. Howell*, 19 Ark., 345; 1 *Bishop on Married Women*, §§ 799-801; *Allen v. Hightower*, 21 Ark., 316. In the absence of the statute, Mrs. Oliver would have been driven to her remedy in equity to recover this property (1 *Bishop on Married Women*, § 801), and in this court she could not have availed herself of her equitable title as a defense to this suit; but, under the statute, she is the legal owner of the lands, and by the provisions of the code may sue and defend in her own name, at law, for the protection of her right. *Gantt's Digest*, § 4487; *Trieber v. Stover*, 30 Ark., 727.

§ 226. — *the deed of trust and lease were accordingly nullities as against the wife; the deed conveying to her separate use having been previously recorded.*

The deed to Mrs. Oliver, by its terms, disclosed that these lands were her separate estate; and this deed was recorded before the execution, by her husband, of the deed of trust to the plaintiffs, and before the execution by him of the lease to the plaintiffs. The record of the deed was notice to the plaintiffs, and equivalent to filing a schedule. *Gould's Digest*, § 8, ch. 111. The deed of trust and lease were nullities as against Mrs. Oliver. Oliver had no possession of the lands or right of possession, but entered under and in subordination to his wife's title. If it be conceded that the lease estops him to deny plaintiffs' title, it does not bind or estop his wife, who all the time has been in the possession of the lands, and entitled to the rents and profits to the exclusion of her husband and his grantors. She is now here setting up her rights, and

she cannot be deprived of them by any lease or other devise of her husband. She is entitled to a judgment that will leave her in the enjoyment of that which is clearly hers.

Such a judgment necessarily inures to the benefit of her co-defendant, her husband, because if one defendant shows a good right to the exclusive possession of the whole premises, the plaintiffs have no right of possession, and their action fails as to all of the defendants.

It would be a vain thing to render judgment in favor of the plaintiffs and against one defendant, upon a record and evidence that disclosed that neither that defendant nor the plaintiffs had any title or right of possession. Besides, the husband has a right to live with his wife on her lands, and a judgment of ouster against him on a lease of her lands, not assented to by her, and which he had no right to make, and that did not bind her, would result in dispossessing the wife from her lands, or in separating husband and wife. Neither of these things can be done. The right of possession in the wife inures to the benefit of the husband, in such case, and as the plaintiffs have no right of possession against the wife, they have none against the husband, by reason of the paramount right and duty of husband and wife to live together, and which is a right and duty founded on such high considerations of public policy that no instrument executed by either can be used by a third party, by way of estoppel or otherwise, to destroy the right or release from the duty.

STARR v. HAMILTON.

(Circuit Court for Oregon: Deady, 268-281. 1867.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—By virtue of the sheriff's sale, on September 4, 1866, and the subsequent deed to the plaintiff, in pursuance of the order confirming such sale, the plaintiff acquired all the estate or interest which the defendant, A. Hamilton, had in the real property described in the complaint at the time of such sale. What then was the interest, if any, of A. Hamilton in the property in question on September 4, 1866?

Block 250 was conveyed to the wife, Christina Hamilton, on February 13, 1858. At that time the effect of marriage upon the property of the wife was regulated and prescribed in Oregon by the rules of the common law. By the common law, the husband, by reason of the marriage, became seized of a freehold estate in all the lands in which the wife had an estate of inheritance. *White v. White*, 5 Barb., 474, 481; *Snyder v. Snyder*, 3 id., 621; 2 Kent's Com., 108; 2 Bac. Ab., 695, 705. This freehold estate, which the common law gave the husband in the lands of his wife, was his absolute property, as much as though it had been conveyed to him by his wife before marriage. It could be seized and sold on execution by the creditors of the husband. 2 Kent's Com., 110.

But it is claimed on behalf of the defendant, Christina Hamilton, that the constitution of this state has worked a change in the law in this respect, which is applicable to this case. The constitution (art. XV, § 5) provides: "The property and pecuniary rights of every married woman at the time of marriage, or afterwards acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of the husband; and laws shall be passed for the registration of the wife's separate property."

Independent of the constitutional provision, the property of the wife is not necessarily her *separate* property or estate. "The separate estate of a married

woman is that alone of which she has the exclusive control and benefit, independent of the husband, and the proceeds of which she may dispose of as she pleases; and its character as such must be imparted to the property by the *instrument* (or *power otherwise*) by which she is invested with such right to it." Cord's Mar. Wom., § 225.

§ 227. *An ordinary deed to a married woman, and to her heirs by her present husband, does not create a separate estate.*

The *instrument* by which block 250 was conveyed to Christina Hamilton did not in any degree impart to it the character of separate property. It is but an ordinary deed, conveying the property to her and heirs by her husband, and contains no terms from which it can be inferred that it was the intention of the grantor to exclude the husband, as such, from the benefit and control of it. For aught that appears in the deed, the property was conveyed to the wife, subject to the general marital rights of the husband as then prescribed and defined by law. Looking then to the nature of the *instrument* by which block 250 was conveyed to the wife, and the law as it stood at the time of such conveyance, there can be no doubt but that the husband then became seized of a freehold estate in the same, which could be taken on execution by his creditors. The fact that the purchase money was derived from the sale of the wife's real property in Missouri, which she inherited from her mother, does not affect the question. That was not her separate property. It was her general property, and subject to the marital rights of her husband, at the time of the marriage in 1853. Moreover, by the sale of it in 1857, it was converted into personal property—money,—and upon the receipt by him became the absolute and exclusive property of the husband.

§ 228. *Constitution of Oregon of 1859, how far held to create a separate estate in the wife.*

The constitution went into force on February 14, 1859. What effect did it have upon the rights of the husband in this property? The constitution makes provision for the registration of the wife's separate property, but does not declare in express terms what shall be considered such separate property. The contemplated registration is not for the benefit of the wife, but for the protection of the public. Still it is evident that the constitution intended to change the law on the subject of the wife's property, and to change in favor of the wife. This being the case, it is the duty of the courts to give effect to such purpose so far as it can be ascertained with reasonable certainty. If the constitution had said: "The property and pecuniary rights of every married woman," etc., *shall be deemed to be her separate property*, or *shall be held by her as her separate property*, no doubt could arise as to the legal effect of the language employed. This would have imparted a particular character to her property so far as enumerated in the constitution, however acquired; the effect of which would have been to have excluded her husband from all control over it or benefit in it. The language actually employed in the constitution is: "*Shall not be subject to the debts or contracts of the husband.*" Taken in connection with the following clause, providing for the registration of the wife's separate property, I think these words ought to be construed, so far at least as third persons are concerned, as equivalent to a declaration that the property enumerated in section 5 shall be the separate property of the wife. If the wife's property is not to be "subject to the *debts or contracts* of the husband," he is thereby precluded from any control over it, and if he has any benefit or interest in it, it is beyond the reach of his creditors, for it is not "subject to his

debts or contracts." This seems to be the conclusion of the supreme court of the state in *Brummet v. Weaver*, 2 Or., 168. Any narrower construction than this would defeat the evident intention of the constitution to change the law concerning the effect of marriage upon the wife's property in favor of the wife. If, notwithstanding the provision in the constitution, the husband, by reason of the marriage, is still invested with a freehold estate in his wife's lands, then it may be well said, as maintained by the plaintiff, that *such estate*—the property of the husband—may be taken on execution by the creditors of the husband, without conflicting with the provision in the constitution concerning the *property of the wife*. Such a construction would leave the subject as it stood at common law, without giving any effect to the constitution whatever. For these reasons I think that the property of the wife, as enumerated or described in the constitution, ought to be considered her separate estate in the technical sense of that term—property over which the husband acquires none of the marital rights known to the common law.

§ 229. — *such provision of the constitution did not operate retroactively, so as to divest rights already vested in the husband.*

At the time the constitution went into force and from the date of the conveyance to the wife, the husband had a freehold estate in block 250. This was a vested right. Could the constitution take it away from him and give it to the wife, or should it be so construed?

The act of April 7, 1848, of the New York legislature, for the more effectual protection of the property of married women, so far as it related to existing rights of property in married persons, was declared unconstitutional and void by the courts of that state. *White v. White*, 5 Barb., 474; *Westervelt v. Gregg*, 2 Kern., 202. These decisions maintain that the rights of the husband in the property of the wife at the time of the passage of the act were vested rights to property, of which he could not be deprived except by due process of law—forensic trial and judgment. But this conclusion was put upon the ground of the prohibition contained in the constitution of the state of New York: "No person shall be deprived of *life, liberty or property*, without due process of law;" while in the case at bar, the enactment under consideration is a part of the constitution itself—the supreme law of the land.

Whether the people of a state in the formation and adoption of a constitution are omnipotent or not is an unsettled question. Probably they ought to be held so, in the same sense in which the English parliament is deemed omnipotent—as having power to "do everything that is not naturally impossible." 1 Black. Com., 161. They are for the time being the supreme sovereign power of the state, and the constitution is their direct, definite and permanent will, expressed in the form of a law. But I do not deem it necessary to pass upon this question, because I am satisfied that the provision in the state constitution was not intended and does not operate retroactively. It is a general and salutary rule of the common law, that "no statute is to have a retrospect beyond the time of its commencement" (6 Bac. Ab., 370); and this rule applies in the construction of a constitution as well as a statute. In the construction of statutes, courts are to take "as a leading guide, . . . the presumption that all laws are prospective and not retrospective." *Dash v. Van Kleeck*, 7 Johns., 486; and Kent, Ch. J., *id.*, 502, says: "The very essence of a new law is a rule for future uses."

The language of the constitution is in no sense retrospective. It declares a new and important rule of property, as to married persons, and this rule, at

least in the absence of express words to the contrary, should be construed as only intended to be applied to "future cases." I understand that the learned justice of the supreme court of the state, from the fourth district, has, on the circuit, construed this provision of the constitution as being prospective. I am not aware of any decision of the supreme court of the state on the subject.

But I think the last clause of section 10, article XVIII, of the constitution, confines the operation of this provision to future cases. Section 10 is the saving clause of the new constitution. It declares that the property and right of the territory and political subdivisions thereof shall remain "as if the change of government had not been made; and *private rights shall not be affected by such change.*" The freehold estate of the husband in block 250 was vested in him before and at the time this change was made. The enjoyment and ownership of this estate was then a private right in the husband — a right of property,—and as such is protected by this saving clause, even if there was any doubt as to the true construction of article XV, section 5.

The registration of this property, on March 28, 1866, so far as block 250 is concerned, availed the wife nothing. In fact she had no separate property in that block to protect by registration. The plaintiff, having succeeded by purchase to the estate or interest of the husband in block 250, is entitled to the possession of the same. The duration of this estate is for the life of the husband, for although, at common law, this estate might terminate with the death of the wife, for want of issue born alive, yet by our statute the husband is tenant by the courtesy, "although such husband and wife may not have had issue born alive." Or. Code, 717. As the defendants wrongfully withhold the possession from the plaintiff, he must have judgment against them accordingly, and against the defendant, A. Hamilton, for damages for the use and occupation of the property since September 4, 1866, according to the findings of the court.

§ 230. — *as to lots conveyed to the wife after the constitution went into force, rule of wife's separate property applies. Objections considered.*

As to the lots 3, 4, 5 and 6 in block 253, the facts are different. They were conveyed to the wife after the constitution went into force, and by force of the constitution and the registration of March 28, 1866, must be held to be the wife's separate property, unless the following objections of the plaintiff or some of them are sufficient to take the case out of the constitution:

1. The constitution can only apply to future marriages, for by the obligations of the marriage contract entered into before the constitution, the husband was entitled to a freehold estate in all estates of inheritance which the wife might acquire during coverture.

2. The property in these lots was acquired by purchase, and property acquired by the wife after marriage is not declared to be separate property by the constitution, unless acquired by *gift, devise or inheritance.*

3. If these lots can be said to be acquired by gift, it was the gift of the husband to the wife, and on grounds of public policy the constitution should be so construed as to exclude such gifts from the category of separate property.

The first of these objections raises the question, long mooted, as to whether marriage is a contract within the provision of the national constitution which forbids any state from passing a law impairing the obligation of a contract. I do not think this objection well founded. Marriage has its inception in contract — the assent of the parties — but when established it becomes a relation. This relation is in no sense a contract. It is rather a civil institution, beyond

the control or caprice of the parties to it, to be governed and regulated by law. This law, and not contract, regulates and prescribes the rights of the parties in the property of each other, and until these become vested interests, the legislative power may modify them from time to time, to suit the convenience and wants of society, or to promote the relation or to protect the parties to it. In my judgment the constitution should be construed as applicable to marriages in existence when the constitution went into force, so far as the after-acquired property of the wife is concerned. See *White v. White*, and *Snyder v. Snyder*, *supra*, 477, 623.

The second objection is not free from difficulty. Strictly speaking, the real property can only be acquired by *purchase* or *descent*. "Descent is the title whereby a person, upon the death of his ancestor, acquired the estate of the latter as his heir at law." Bouv. Dic., 448. The title to real property acquired in any other manner than by descent is title by purchase. The phrase in the constitution, "by inheritance," is in legal parlance the exact equivalent of "descent." Title, or acquisition *by gift or devise*, is in law a title by purchase. The constitution cannot be construed to prevent the wife in any case from holding as her separate property that which she acquires during marriage by purchase in the legal sense of that term. It expressly includes acquisition by *gift or devise*, and in law these are both deemed titles by purchase.

But I suppose the constitution could not be construed to include property acquired by the wife by purchase in the popular sense — that is, when the title was obtained for a valuable consideration moving directly from herself, — unless the purchase consist as a matter of fact in the exchange or investment of already acquired separate property for some other.

However, upon the facts, in my opinion, the title to these lots was not acquired by the wife by purchase in the popular sense. It must be presumed that the consideration proceeded directly from the husband. The wife had no separate property out of which to make the purchase. The \$700 which she loaned (as she calls it) her husband in 1857 was already his property by virtue of the marriage. The consideration paid for these lots being just \$700, it is evident that as between the husband and wife the purchase was made for the purpose of returning to the latter the remainder of the money that he had acquired by the sale of her Missouri property. In this view of the matter, the transaction is substantially a gift to the wife from the husband.

The third objection assumes that a gift from the husband to the wife is against public policy. The language of the constitution is unqualified — property acquired by *gift*. As the law stood before the constitution, the husband could give property to his wife, though for other reasons it was necessary to resort to the intervention of a trustee. It should be remembered, also, that in this case there is no question of fraud or rights of creditors. The plaintiff claims as the purchaser of the husband, and only acquired the rights of the latter as against the wife. Where a husband in solvent condition and in good faith makes a gift to his wife, I know of no rule of law or principle of public policy that can be invoked to declare the same void.

Besides, whatever may *have been* the law or public policy, I do not see how any court can presume to limit or restrict the language of the constitution, and hold that the unqualified words — *acquired by gift* — shall have effect only in the diminished sense — by gift from some person other than her husband. This would be *legislation* and not *construction* — and legislation on mere

grounds of public policy, a matter for the law-maker to determine and not the courts.

§ 231. *Application of rule to existing facts.*

I am of the opinion that the lots in block 253 are a gift from the husband to the wife, and that by force of the constitution and the registration of March 28, 1866, they became the separate property of the latter. This being the case, the plaintiff acquired nothing by his purchase of the husband's interest at the sheriff's sale, for the simple reason that the latter had no interest in the property — at least no interest which could be the subject of levy and sale on execution.

In the consideration of lots in block 253, I have omitted to make special mention of lot 4. The consideration for the conveyance of this lot to the wife was her release of her right of dower in certain other property of the husband's which had been taken and sold on execution. This right of dower was a mere contingency, depending upon whether the wife survived the husband or not. The estate of the tenant in dower is neither acquired by gift, devise or inheritance. The contingent right to dower in the lands of the husband, which the wife has during the life of the latter, is a mere expectancy and cannot be called her separate property — if it can be termed property at all. Money derived from the sale of such right becomes the property of the husband. When the husband joined with the wife in the release of the right of dower to Robinson, in consideration that Robinson then conveyed to the wife lot 4, I think he appropriated the proceeds or value of the right of dower to the purchase of that lot, and made a gift of it to the wife.

It may also be noticed, that by the terms of the conveyance, granting the lots in block 253 to the wife, it is provided that she shall hold them to her own separate use and benefit, and free from the control of her husband. Whether this form of conveyance was not sufficient to make this the separate property of the wife, independent of the provision of the constitution, I do not decide. The question was pressed upon the court by the counsel for the defendants, but the conclusion to which I have arrived renders it unnecessary to consider it.

Judgment must be given for the plaintiff, in accordance with the conclusion of law in the findings of the court.

WILLIAMS v. KING.

(Circuit Court for Connecticut: 18 Blatchford, 282-288. 1876.)

Opinion by SHIPMAN, J.

STATEMENT OF FACTS.—This is an action of *assumpsit* against a married woman, to recover the amount of a negotiable promissory note for the sum of \$2,500, made and signed by her alone, dated December 17, 1868, and payable eighteen months after its date, to the order of William C. Hurd, and by him indorsed to the plaintiff. The defendant executed this note in consideration of the sale to her, by the payee, of certain shares of the corporation known as the Silix Lead Company. The case was tried by the court upon the following agreed statement of facts: "The defendant was married November 2, 1864, to O. B. King, of Watertown, Connecticut, with whom she has ever since lived as his wife. She executed the note in question at said Watertown, upon the day of its date, to wit, December 17, 1868, for the consideration

stated in the declaration. At the time of her marriage she was possessed of property, real and personal, exceeding in the aggregate \$20,000. A portion of the personal property consisted of stocks in sundry incorporated companies, some of which stocks have been sold since her marriage, and reinvestments made of the avails thereof in other stocks, both before and since the execution of said note, which reinvestments have not diminished the value of the property owned by her at the time of her marriage. In making the reinvestments, the shares of stock purchased or subscribed for have been issued to the wife in her own name, and the subscriptions therefor, when made, were made by her husband acting as her attorney. None of the property owned by her at the time of her marriage had been settled to her sole or separate use, nor has any of her property, since acquired, been conveyed to her in consideration of her personal services during such coverture."

§ 232. Statutes of Connecticut relative to suits against married women stated.

The general assembly of the state of Connecticut passed, in the year 1872, the following act: "Actions at law may be sustained against any married woman upon any contract made by her, upon her personal credit, for the benefit of herself, her family or her estate, . . . in the same manner as if she were sole, single and unmarried." It is admitted that this act simply changed the form of the remedy for liabilities which had been, or should be, incurred by married women, and did not create any new liability, and, therefore, applied to pre-existing contracts. *Buckingham v. Moss*, 40 Conn., 461. The statute authorized an action at law against a married woman for the same cause of action upon which she would previously have been liable in equity. Another act had been passed in 1869, in regard to suits against married women, but, as that act was clearly prospective, its effect need not here be considered.

§ 233. For what debts the separate estate of a married woman is liable in equity.

The general question which is now to be determined is, whether, under the statutory system of Connecticut in regard to the property of married women, as that system existed in 1868, a bill in equity could have been maintained against the defendant, to enforce payment of this note from her real or personal property? "The separate estate of a married woman will, in equity, be held liable for all the debts, charges, incumbrances and other engagements which she does expressly, or by implication, charge thereon." 2 Story's Eq. Juris., § 1399. Her separate estate is, by implication, charged with the payment of debts contracted for the benefit of the estate, or for her own benefit, and upon her personal credit. Whether the contract was made upon her personal credit depends upon the circumstances of the case; but it is not necessary that the contract should make any reference to the separate estate, and it is presumed that a contract entered into by a married woman having a separate estate, for its benefit, or for her exclusive benefit, has been contracted upon the credit of her estate. *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y., 613, 638; *North Am. Coal Co. v. Dyett*, 7 Paige, 9; *Ballin v. Dillaye*, 37 N. Y., 35; *Mrs. Matthewman's Case*, Eng. L. R., 3 Eq. Cases, 781. The Connecticut statute, which was intended to be in affirmance of the equity principles of the common law, declares the liability of a married woman to be "upon any contract made by her upon her personal credit, for the benefit of herself, her family, or her estate." The contract which is now in suit is a note entered into by a married woman, for the purchase price of stock which she

had herself bought. A debt contracted for the purchase of property which goes into the actual or constructive possession of the purchaser is a debt contracted for the benefit of his estate. *Ballin v. Dillaye*, 37 N. Y., 35. These principles being admitted, the question upon which the parties are at issue is, whether the defendant had or had not any separate estate which could be bound or held liable for the payment of her note. If she had none, her contract was invalid in law, and inoperative in equity. If she had separate estate, it is admitted that the contract was, in equity, valid and operative.

§ 234. *Statute of Connecticut in force in 1868 construed.*

The statute of Connecticut which was in force in 1868, in regard to the personal property of married women, provided, in substance, that "all the personal property of any woman married since the 22d day of June, 1849, and all the personal property thereafter acquired by a married woman, and the avails of any such property, if sold, shall vest in the husband, in trust for the following uses—to receive and enjoy the income thereof during his life, subject to the duty of expending from such income so much as may be necessary for the support of his wife during her life, and of her children during their minority, and to apply any part of the principal thereof which may be necessary for the support of the wife, or otherwise, with her written assent, and, upon his decease, the remainder of such trust property shall be transferred to the wife if living, otherwise as the wife may, by will, have directed, or, in default of such will, to those entitled by law to succeed to her intestate estate."

§ 235. *Difference between statutory estate and the equitable sole and separate estate of a wife.*

The rights in the personal property of the wife, which are conferred upon the husband by this statute, are a modification of the rights which were vested in him by the common law. He formerly had an absolute estate; he now has a trust estate, with the right to receive and enjoy the income during his life, which income must, however, be appropriated, if necessary, to the support of his wife and minor children. This peculiar statutory estate is very far from being a sole and separate estate of the wife, which is defined to be that estate, either real or personal, which is settled upon the wife for her separate use, without any control over it on the part of her husband. *Butler v. Buckingham*, 5 Day, 492. The husband is vested with the trust estate, and the legal title to her personal property, by virtue of his position as husband. He is not trustee to her sole and separate use, but receives and enjoys the income during his life. By virtue of the marital relation, he has the custody and control of the property, and of the rents and income thereof, until he is removed from the trusteeship for cause, or until he abandons his wife, and in the latter event, only, does the property vest in her as her sole estate. If the wife could, during the trusteeship of the husband, bind the trust property by her own obligations, the checks which the statute has attempted to place upon her right to the enjoyment of the property during her life would be of very little avail. The intent of the statute was to modify the severity of the common law, and preserve her personal estate for her heirs, but not to place it within her control as her separate estate, unless by the agreement of the parties. Chief Justice Seymour, in *Cooke v. Newell*, 40 Conn., 596, defines the nature of the estate which is created by the statute, as follows: "The statute *limits* the rights of the husband in his wife's property, but does not deprive him of all rights. It leaves him the income and profits of it, and, except so far as specially restrained, he has the care, management and control of it during his life.

The trust is, therefore, not to the sole and separate use of the wife, free from the control of her husband. She has not that control of it which she has in equity of her separate estate." It follows that the personal property which is vested in the husband, as trustee, and the title of which has never become divested, is not bound by the wife's contracts.

But, by ante-nuptial or post-nuptial agreement, the wife's property may be settled upon her to her separate use, freed from the trust. The husband may, after marriage, give his own property to the wife, when the rights of creditors do not interfere, in which case she will take a sole and separate estate. The husband will have thereafter, by virtue of the statute, no such use or life estate in the property so given, as would be vested in him in respect to personal property given to the wife by a third person, without words indicating that it was to her sole use. If an absolute gift is made to her by the husband, it is to her exclusive use, although words of exclusiveness are not used, and he cannot resume the use or control of the property by force of the statute. He will be her trustee under the general rules of equity, if necessary to preserve the title to the property, but not under the statute. *Riley v. Riley*, 25 Conn., 154; *Deming v. Williams*, 26 Conn., 226; *Baldwin v. Carter*, 17 Conn. 201. The husband may, also, by clear and unequivocal acts, free the property of the wife from the trust which the statute has created, divest himself of the estate which he has in consequence of the marriage, and give to the wife the entire estate and right to the income, so that, as to the personal property which he has thus transferred, while the legal title may remain in him, she will have a sole and separate estate. Merely permitting the title of stocks or bonds to remain in her name, or permitting her to collect interest or dividends, without any other circumstances to indicate his intention, would not show that the trust was waived. But if, in addition, he permits the wife to manage the property as her own, to change its character, to sell it and invest the proceeds in her name, or, if he transfers the stock to her, giving her a certificate in her own name, by these and like acts he furnishes the clear and satisfactory evidence which the law requires, of his intention to relinquish all his claims to her property and to give to her its complete control. *Smith v. Chapell*, 31 Conn., 589; *Jennings v. Davis*, 31 Conn., 134; *Mason v. Fuller*, 36 Conn., 160; *Hayt v. Parks*, 39 Conn., 357.

§ 236. *Subscriptions for stock in the wife's name by the husband acting as her attorney, held on facts to create separate property in her which was bound by her contract.*

The summary of facts in this case states that a portion of the personal property which the defendant owned at the time of her marriage consisted of stocks in incorporated companies, some of which have been sold since her marriage, and reinvestments made of the avails thereof, both before and since the execution of the note in suit. "In making the reinvestments, the shares of stock purchased or subscribed for have been issued to the wife in her own name, and the subscriptions therefor, when made, were made by her husband acting as her attorney." It thus appears that, before the execution of this note, the purchased stocks were issued to the wife in her own name, although the statute provides that all reinvestments shall be made in the name of the husband as trustee. But a more significant and unequivocal act, indicating an intent upon the part of the husband to abandon the trust estate, as to a portion, at least, of the property, and give to the wife the interest which he had in that portion, is the fact that the subscriptions for new stock were made by

the husband acting not as trustee, but as her attorney. These subscriptions, being made by her attorney, must have been made in her name, and the certificates must also have been issued to her in her name, by the direct agency of her husband acting in her behalf. These positive acts of the husband leave no doubt, under the Connecticut decisions in regard to the statutory *status* of the wife's property, that he had given to her the entire control of so much, at least, of the personal property as he had then deliberately subscribed for in the name of the wife, and, therefore, that, at the time of the execution of the note, she had separate property which was intended to be and was bound by her contract made for the benefit of her estate.

It is not necessary to decide whether the real estate was the separate property of the wife. The brief statement of facts does not show whether the real estate was situated in Connecticut or not, but it is inferred that it was situated in this state. As it is a question of importance, whether, under the statutes of Connecticut, real estate which has been conveyed to a married woman without words indicating that it was conveyed to her sole use, is to be considered as her separate estate, and as it is a question not necessary to be now decided, I express no opinion upon this branch of the case.

Let judgment be entered in favor of the plaintiff.

SYKES v. CHADWICK.

(18 Wallace, 141-151. 1878.)

ERROR to the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—The plaintiff, a married woman, was entitled to an inchoate dower interest in certain real estate in which her husband and the defendant were tenants in common. They desired to make a conveyance of it, and, in consideration of her joining in the deed and relinquishing dower, they gave their joint note for \$5,000. This note being due and unpaid, she brought suit upon it against the defendant only. The court below sustained the suit, and from its judgment this writ of error was taken.

§ 237. *Legislation in reference to separate property of married women in the District of Columbia.*

Opinion by MR. JUSTICE BRADLEY.

The question is whether the note on which this suit is brought against Sykes is valid, as against the defendant, so as to sustain the present action. In aid of the plaintiff's case certain acts of congress relating to the District of Columbia have been referred to. First, an act regulating the rights of property of married women in the District of Columbia, passed April 10, 1869, by which it is enacted, in substance, that the right of a married woman to any property belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were a *feme sole*, and not subject to the disposal of her husband or liable for his debts; and she may convey or bequeath the same as if she were unmarried. Also, that any married woman may contract and sue and be sued in her own name in all matters having relation to her sole and separate property in the same manner as if she were unmarried. Secondly, an act to amend the law of the District of Columbia, in relation to judicial proceedings therein, passed February 22, 1867, by the twentieth section of which it is enacted that where money is payable by two or more persons jointly or severally, as by joint obligors, covenantors, makers, drawers or in-

dorsers, one action may be sustained and judgment recovered against all or any of said parties by whom the money is payable, at the option of the plaintiff.

With regard to the first-mentioned statute, relating to a married woman's property possessed at the time of marriage or acquired afterwards, we think it clear that it does not refer to her contingent interest in her husband's estate, but to property owned by or coming to her independent of her husband — property which, but for the statute, he would acquire an interest in by right of marriage. The sole object of the statute was to prevent his acquiring such interest in her property. Her right of dower in his property stands as it did before the statute. She cannot dispose of it independently of her husband; nor can she, without his consent, separate it from his estate in the land.

§ 238. *The inchoate right of dower is a valuable right, and the relinquishment of it may be the consideration of a valid contract.*

Still her right of dower is a valuable interest, which she cannot be compelled to resign, and which the law very carefully protects from the control of her husband. When she does part with it, an officer must examine her apart from her husband to ascertain whether she does it freely and voluntarily. And whilst this interest is a valuable right of the wife, it is a corresponding incumbrance upon the land to which it attaches. By the aid of modern science it is capable of a definite valuation. Hence it is easy to ascertain whether an undue valuation is placed upon it. In this case no suggestion of that kind is made. For all that appears the transaction was made in good faith. At all events the parties to it cannot allege the contrary.

§ 239. *The wife's relinquishment of dower is a valid consideration for a promise to pay money to her separate use.*

The wife's interest being valuable, and one that may be disposed of by her with her husband's concurrence, the question arises whether her release of her right of dower is a good consideration for a separate provision for her benefit, or of a promise to pay money to her separate use. And of this we have no doubt. The question would hardly have been raised had the arrangement been made with the purchaser instead of the vendors of the land, one of whom was the plaintiff's husband. But arrangements of this kind made with the husband are sustained in equity by very high authority. In *Garlick v. Strong*, 3 Paige, 440, where a husband who was about to sell his estate agreed with his wife that if she would release her dower she should share a portion of the purchase money to her separate use, it was held by Chancellor Walworth that the agreement was valid, and that a note given by the purchaser to a trustee for the wife for the amount allowed to her in the arrangement became her separate property, and though the money due on the note was paid and invested by the trustee in a bond in the wife's name, which bond was afterwards disposed of by the husband without her consent, the fund was followed into the hands of the party receiving it with notice, and decreed to belong to the wife. The chancellor said: "It is well settled that a post-nuptial agreement between the husband and wife, by which property is set apart to her separate use, will be sustained in equity though void at law. The relinquishment of the dower in this case was a sufficient consideration to support this agreement on the part of the husband. Although as against creditors, whose debts existed at the time, post-nuptial agreements will not be permitted to stand beyond the value of the consideration, that principle cannot be applied to this case, which appears to be an attempt on the part of these defendants to defraud the wife

of the moneys to which she is equitably entitled under this agreement." These views of the chancellor seem to us to be founded in justice and good sense. The same principle was decided in Virginia in the case of *Harvey v. Alexander*, 1 Rand., 219, and in *Quarles v. Lacy*, 4 Munf., 251. In each of these cases property was conveyed to the separate use of the wife, by the procurement of her husband, in consideration of releases of dower made by her in his lands. It was held in the latter case that such a transaction was good as against creditors to the extent of the value of the dower released. Indeed, as far back as the time of Chief Justice Hale, it was held that if a wife join in a fine so as to relinquish her dower, it will be a good consideration for a settlement. *Lavender v. Blackstone*, 2 Lev., 147; *Atherley*, 161; and see 2 Kent, 166; 2 Scribner on Dower, p. 6, § 6; *Bank of the United States v. Lee*, 13 Pet., 110; *Niemcewicz v. Gahn*, 3 Paige, 614.

We may therefore regard the transaction under consideration as valid and binding in equity both on the defendant and the husband of the plaintiff. The note given to the plaintiff was the fruit of this transaction. The transaction itself was a good and sufficient consideration for the note. The latter is her separate property, as much so as an equal amount of money would have been, if it had been placed by the vendors to her credit in bank. She having performed her part of the agreement, there became due to her so much money for her separate use and as her separate property. The note is no part of the contract by which her dower was released. It is a mere security given to her for the money growing due to her out of that contract. Her husband and his copartner became indebted to her, and gave her this note as her separate property. Such a note must be just as valid as if she had lent them the amount out of her separate estate, and taken their note as security for the payment of it. The transaction is virtually the same as if they had paid her the money, and she had lent it to them on the note in question.

The case may be shortly stated thus: By the act of 1869 the plaintiff, as a married woman, acquired the capacity at law to receive property to her separate use, and subject to her separate and exclusive control as if she were unmarried, provided it does not come to her by gift or conveyance from her husband—by which is undoubtedly meant voluntary gift or conveyance. Having this capacity, she did receive and acquire, for a good and valid consideration moving from herself, the promissory note in question.

§ 240. *Under the married women's act, the wife who has taken a note upon valid consideration may sue at law one of the makers.*

This note, then, being her separate property, not acquired by gift or conveyance from her husband in the sense in which the statute uses those terms, she is entitled to the benefit of the statute in reference to the exclusive possession and enjoyment of the note, and to the exclusive right of suing upon it. As to it, she is relieved from the incapacity which the common law imposed upon her, and is as if she were unmarried. The technical reasons, therefore, which, at the common law, rendered void a note or other obligation made by the husband to the wife, no longer exist in this case. And if there are still any such reasons which would compel the plaintiff, in enforcing the note as against her husband, to seek the aid of a court of equity, there are none to prevent her from suing the defendant upon it in a court of law. The statute of 1867, above referred to, enables the holder of a joint obligation to sue either or any of the parties to it without suing the others. The defendant, therefore, has no legal ground of defense to the action. The note is founded upon a good

and valid consideration. Whether a right to sue the other maker of it exists or not is of no consequence to the defendant. As to him, there can be no doubt that the plaintiff is invested with all the capacities and rights which are necessary to enable her to maintain an action at law on the note.

§ 241. — *effect of joining in a previous deed of trust considered in this connection.*

It is contended, however, that, prior to the sale of the property and the giving of the note, the plaintiff had joined the defendant and her husband in a deed of trust for the same property given to secure the payment of a loan made by them, and that, by this outstanding deed of trust, her right of dower was extinguished.

If it be true, as contended for by counsel, and as the cases seem to show, that, in this District, the antiquated rules on this subject still prevail — so as to bar a widow of all dower in an equity of redemption — if instead of being a mere security for money, a mortgage, or deed of trust in nature of a mortgage, transfers the legal estate so as deprive the mortgagor of the ownership of his property, yet the plaintiff would have been reinvested with her right to demand dower in the land whenever the purposes of the trust should be accomplished, and no purchaser would deem it safe to take a conveyance of the equity of redemption from the mortgagors without a release of her contingent right. And whatever technical obstacles the trust deed may have raised against her right to recover dower at law, in case of the death of her husband, no one desiring to purchase the property would be willing to incur the hazard of those obstacles being removed. At all events the defendant, when he was endeavoring to negotiate the sale of his property, deemed it of sufficient importance to give the note in question in consideration of the plaintiff joining in the deed, and releasing any contingent right she might have. This very act of hers may have been necessary, and we have a right to infer that it was deemed important, to the closing up of the transaction and securing the sale of the property. If any release is deemed requisite to confirm the title of lands with which one has been connected, though, by a proper construction of the law, he has no interest in them whatever, still such release will be a good consideration for a promise, or for the payment of money.

Judgment affirmed.

MR. JUSTICE MILLER dissented, holding that the plaintiff's contract was not made with reference to separate property owned by her at the time, and that she had no capacity, therefore, to make the contract. His views were stated as follows:

"It is undoubtedly true that a release of dower is a good consideration for a promise, whether in writing or otherwise, and the promise would be valid if made to a person capable of contracting. But this leaves untouched the question of plaintiff's capacity to make the contract. The release of dower and the agreement to pay a certain sum for it was one contract. The execution of the deed of release and of the notes were each the consideration for the other. I cannot see the force of the dialectics by which, after the contract is made, the note given as evidence of one part of it is called the separate property of the wife, concerning which the contract was made. That is to say, this contract was made in reference to the paper, and it constitutes the material part of the note, and, this being her separate property, enables her to make the contract by which Sykes became her debtor.

"But suppose no note had been taken, the promise would have been just as good as it is with it. Where would then have been her separate property, about which she was authorized to contract? It is clear to me that, to enable a married woman to contract, she must have and own separate property at the time of making the contract, and that, to make that contract valid, it must relate to that property. If the proposition on which this case is rested be sound, the wife need have no separate property to enable her to contract; but she can make any agreement by which she is to receive something, put it in writing, call the paper which evidences the agreement her separate property, and the thing is done."

FLANDERS v. ABBEY.

(Circuit Court for Wisconsin: 6 Bissell, 16-22. 1874.)

Opinion by HOWE, J.

STATEMENT OF FACTS.—This is a demurrer to a bill in equity, brought by plaintiff as assignee of Little & Fyler, bankrupts. The bill alleges that in February, 1871, Little executed a note for \$2,000, and procured it to be indorsed by the defendant, Matilda O. Abbey, the wife of defendant, D. C. Abbey, and "by such indorsement charged her own individual and separate estate for the payment thereof;" that the note was subsequently "passed" to the defendant bank; that within two months of the adjudication of bankruptcy, all the defendants and the bankrupt Little confederated together for the purpose of obtaining a fraudulent preference over the creditors of the bankrupt, and, in execution of that purpose, obtained \$2,000 from the sale of property of the bankrupts, and paid the same to the defendant bank, and took up the note; that the bankrupts were at that time insolvent and that all the defendants knew them to be so; that the note was so paid before maturity; that the defendant bank knew that the money was obtained from the property of the bankrupts; that it was paid to and received by it to prevent its going into the hands of the assignee, for the purpose of obtaining a fraudulent preference and to defeat the provisions of the bankrupt act.

The bill further avers that defendant, D. C. Abbey, was in the employment of the bankrupts when these acts were committed, and was at the same time the agent of his wife in all the transactions; that defendant Matilda "has of her own separate estate, independently of her said husband, certain property and estate in the city of Milwaukee, Wisconsin, which said property and estate she, the said Matilda, charged with payment of the note hereinbefore mentioned."

The relief prayed is that the plaintiff may be decreed to be entitled to the said sum of \$2,000, and that the defendant bank and defendant Matilda be decreed to pay it to him, and for general relief.

Each of the defendants files a separate demurrer. The causes of demurrer assigned are: 1. That plaintiff has complete remedy at law. 2. That plaintiff has joined several distinct matters in his bill. 3. Multifariousness: that defendant D. C. Abbey is not properly a party, no relief being prayed against him. 4. That plaintiff, as to defendant Matilda, has not stated such a case as can constitute a proper or legal charge upon her separate estate.

1. As to the alleged want of equity in the bill, as against all the defendants. The substance of the bill in this respect is that the acts of the defendants in obtaining from the property of the bankrupts the money and applying it in

the payment of the note due to one of them and indorsed by the other, under all the circumstances, was a fraudulent act, both as to the other creditors and as to the bankrupt act itself.

§ 242. *Jurisdiction of equity tribunals in cases of fraud, when concurrent and when exclusive.*

It is well settled rule that courts of equity possess a general concurrent jurisdiction with courts of law in cases of fraud cognizable in the latter; and exclusive jurisdiction in cases of fraud beyond the reach of the courts of law. 1 Story, Eq. Juris., § 184. In cases of alleged fraud, courts of law and equity have a concurrent jurisdiction, and the party may apply to one or the other at his option. *Goss v. Lester*, 1 Wis., 52.

Section 2 of the bankrupt act gives this court jurisdiction of all suits in law or equity which may be brought by the assignee touching any property or rights of property of the bankrupt transferable to or vested in such assignee. This section leaves the jurisdiction as between the two courts as it was at the time of its passage. It does not enlarge the equity powers of the court, but leaves them as they were before. Whenever, then, any proper party would be entitled to invoke the aid of an equity court, the assignee in bankruptcy, by virtue of this section, has the same right upon the same facts. The allegations of fraud confer the power upon the equity court in both cases.

These principles were applied by Judge Lowell, of the district court of Massachusetts (*Pratt v. Curtis*, 6 N. B. R., 139), in the case of a suit in equity by the assignee of a bankrupt to set aside a voluntary conveyance of land, where the fraud alleged was an attempt to delay and hinder creditors; to a suit in equity by an assignee to set aside mortgages of personal property, where the fraud alleged was a design to give the mortgagee a preference over creditors of the bankrupt, by Justice Clifford, in circuit court for the district of Maine (*Scammon v. Cole*, 5 N. B. R., 257); to a suit in equity by an assignee to recover the proceeds of goods sold under judgment in a state court against the bankrupt, taken by confession, where both parties knew of the insolvency. *Traders' Bank v. Campbell*, 14 Wall., 87. These proceeds were money in the possession of the bank, and a suit at law was a plain, simple and adequate remedy. I think these cases dispose of the demurrer, and that it must be overruled as to the defendant bank.

§ 243. *The contracts of a married woman, how far binding at law and in equity.*

II. The demurrer as to the other defendants raises an entirely different question. Is the plaintiff entitled to any relief as to the defendant Matilda and her husband upon the facts stated in the complaint? We have already shown that the foundation for the claim for relief against her is the indorsement by her of the paper of the bankrupts, for their accommodation. It is not alleged that it was in any manner for the benefit of her separate estate, or that she received any consideration for the act. The bankrupts wanted to borrow money. They were unable to do it upon their own credit. She executed no paper or instrument creating any express charge upon her estate. The bill alleges that she charged her separate estate "by such indorsement." After the indorsement, and probably because of it, it was taken by the defendant bank. At law, independent of any statute of this state, such an indorsement would be void, creating no liability against the *feme covert*. The effect of the Wisconsin statute of 1850 (the only one that can affect this question), conferring certain powers upon married women, has been several times before

the supreme court of this state. It was finally held, in *Conway v. Smith*, 13 Wis., 125, that the contracts of a married woman, when necessary or convenient to the proper use and enjoyment of her separate estate, were binding in law.

But the same court held, in *Todd v. Lee*, 15 Wis., 365, that all her other engagements stood as before the passage of the act, good only in equity. The change from an equitable to a legal estate has not, in respect to them, enlarged her power or removed the disability of coverture, but she remains as if still possessed of an estate in equity, without restriction as to her power of disposition.

The only question, then, is: Will the *feme covert*, by the indorsement of this note, create such a debt or incur such a liability that a court of equity will make it a charge upon her separate property? Different rules have been applied to such facts by the leading equity courts of this country and those in England. The English rule has been broader than that usually enforced here. There they have applied the separate estate of a *feme covert* to the payment of all her debts, without inquiry into the purposes for which they were contracted. It was enough to know that she had contracted the liability; the court applied her estate to its discharge as fully as a court of law applied the property of any debtor to the payment of a judgment against him. The courts of New York went very far at one time in the same direction. Without stopping to make any examination of the many cases on this subject, it is sufficient now to remark that a more restricted rule has been generally applied by the courts of this country, and I think the true doctrine is that stated by the supreme court of Massachusetts in the case of *Willard v. Eastham*, 15 Gray, 328.

When, by the contract, the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate, or its income, to the extent to which the power of disposal by the married woman may go. But when she is a mere surety or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate without an express instrument making the debt a charge upon it. Upon this point see also *Yale v. Dederer*, 18 N. Y., 265; *Peake v. La Baw*, 6 C. E. Green, 269; *Kim v. Weippert*, 46 Mo., 504.

If a court of equity will not enforce the liability created by that indorsement upon the separate estate of this defendant, it will be at once conceded that it will not make any decree against her personally. The only reason given for making her a party is the fact of this indorsement. It is not alleged that she received the money from the bankrupt's property with which the note was paid. That was paid to the bank. As no decree can be had against her, it follows that she was improperly made a defendant. The only reason for making D. C. Abbey a defendant is that he is the husband of Matilda, and that she could not be sued without joining him in the proceedings.

The demurrer must be sustained as to the defendants Abbey, without costs to either party, plaintiff to amend his complaint within ten days, if he so elects.

BEDFORD v. BURTON.

(16 Otto, 338-342. 1882.)

APPEAL from U. S. Circuit Court, Middle District of Tennessee.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—This case arises on a bill in equity filed by G. W. Burton, the appellee, alleging that in February, 1872, he sold and conveyed to America Bedford, one of the appellants, wife of John R. Bedford, the other appellant, in fee, for her separate use, free from the control of her husband, a certain tract of land in Tennessee for the consideration of \$7,500, one-third of which was paid down and the balance secured by the promissory notes of Mrs. Bedford, drawing interest at the rate of ten per cent. per annum. The deed of conveyance specified these notes and reserved a lien on the land for the payment thereof. The notes were paid in part, but not in full, and the bill was filed for the foreclosure and sale of the land to raise the balance due. The defendants, Bedford and wife, filed a demurrer, which was overruled, and thereupon they filed an answer and cross-bill admitting the facts stated in the bill and that they took and still had possession under the purchase; and the cross-bill alleged that the defendants had made permanent improvements on the land to the value of \$500; and claimed that the sale was void because of the coverture of the grantee, and prayed that it might be declared void, and that Burton should be decreed to refund the amount paid on the purchase, together with the value of the improvements, with interest, after deducting the value of the rents whilst the property was occupied by the defendants. Burton demurred to the cross-bill; and on final hearing the court sustained this demurrer, and made a decree for the foreclosure and sale of the property as prayed in the original bill, but declared that the complainant was not entitled to a personal judgment against America Bedford. From this decree the defendants have appealed.

The decree is sought to be reversed on two grounds: *First*, because the sale to America Bedford was void by reason of her coverture, and ought to be declared void, and the money paid by her decreed to be refunded; *secondly*, because the decree gives ten per cent. interest on the notes, a rate of interest which is not allowed by the law unless there is a special contract therefor, the legal rate being only six per cent.; and a *feme covert* is incapable of making such special contract.

§ 244. *A feme covert may purchase land, and a lien may be retained against her for the purchase money.*

The authorities are numerous and conclusive to the effect that a *feme covert* may, with her husband's consent, take land by purchase, and that a security given thereon by her for the purchase money will be enforced. It was so held by this court in the case of *Chilton v. Lyons*, 2 Black, 458, where a lien for the unpaid purchase money of land sold to a married woman was enforced by a decree for the sale of the land. Mr. Justice Grier, delivering the opinion of the court, said: "When one person has got the estate of another, he ought not, in conscience, to be allowed to keep it without paying the consideration. It is on this principle that courts of equity proceed as between vendor and vendee. The purchase money is treated as a lien on the land sold, where the vendor has taken no separate security." In a well considered case decided by the chancellor of New Jersey (*Armstrong v. Ross*, 20 N. J. Eq., 109), where property was sold and conveyed to a married woman, and she and her husband

executed a mortgage for the purchase money, but the execution by the wife was void because she was not privately examined, it was nevertheless held that the vendor had a lien for the purchase money, and also that the mortgage, being given for the benefit of her separate estate, although void as a mortgage, might be decreed a lien on such separate estate. In the case of *Willingham v. Leake*, 7 Baxt., 453, it was held by the supreme court of Tennessee that where land was sold and a title bond given to a married woman, who gave her notes for a part of the purchase money, the vendor's lien could be enforced, although the notes might be void as against the vendee personally. In the subsequent case of *Jackson v. Rutledge*, 3 Lea, 626, decided as late as December term, 1879, the same court held that if a married woman buy land, partly for cash and partly on time, and accept a deed of conveyance to her separate use, a lien being retained for the unpaid instalments, she cannot have the money which she has paid refunded merely because of her coverture, and the lien reserved for the payment of the purchase money may be enforced in equity. This case was nearly parallel to the present. A deed was executed to the married woman for her sole and separate use, retaining a lien on the land for the payment of the notes given for the purchase money, and the grantee and her husband went into possession. A cross-bill was filed, as in the present case, seeking to set aside the contract as void, and for a return of the money paid, and the value of permanent improvements. A decree for the sale of the land to satisfy the unpaid purchase money was made by the chancellor, but no personal decree against the parties. This decree was affirmed by the supreme court in an elaborate judgment, in which the authorities on the subject are fully reviewed. The court concludes the examination by saying: "If the conveyance be to the sole and separate use of the married woman, there seems to be no difficulty in treating a debt contracted in the purchase as binding on the property, although not personally obligatory on the *feme*, because, where she takes possession under the conveyance, the debt is contracted for the benefit of her separate estate." Again: "Her incapacity to execute valid notes, if we treat the purchase notes as void on that ground, and because not expressly made obligatory on her separate estate, would not affect the vendor's right to subject the land to the satisfaction of the unpaid purchase money by virtue of the vendor's equity and of the lien reserved. By the delivery and acceptance of the deed of conveyance, the contract was executed and the title vested in her. She takes the title subject to the charge created by the terms of the deed. *Trezevant v. Bettis*, 1 Leg. Rep., 48; *Lee v. Newman*, 1 Memph. L. J., 139; *Eskridge v. Eskridge*, 51 Miss., 522. Under such circumstances, the married woman is not entitled to have the cash payment refunded. In making the payment, as we have seen, she exercised a right which the law concedes. . . . All she can claim is exemption from personal liability."

These cases, decided by the highest court of Tennessee, where the land lies, and where the transaction took place, are of stringent authority, and they accord with our own views of the law.

It should be added that, by the statute law of Tennessee, "married women over the age of twenty-one years, owning the fee or other legal or equitable interest or estate in real estate, shall have the same powers of disposition, by will, deed or otherwise, as are possessed by *femes sole* or unmarried women." Code of Tennessee, sec. 2486. This provision would seem to be sufficient to confer upon a married woman, purchasing land to her own use, power to exe-

cute a mortgage upon the land to secure the purchase money,—binding at least upon the land, if not creating any personal obligation against her.

§ 245. *A conveyance reserving a lien for purchase money and lawful interest is valid against a feme covert purchaser.*

But the present case is a stronger one than that of a mortgage. The deed by which she holds the property is qualified by expressly retaining a lien for the payment of the purchase money. The lien goes with the estate, and affects it in a manner similar to a condition. It is, indeed, in the nature of a condition impressed upon the estate itself. It makes the deed say, in effect, "I convey to you the land, but only upon the condition that you pay the notes given for purchase money; if they are not paid, I am to hold it as security."

This peculiar character of the lien seems to be a good answer to the second ground for reversal,—the reservation of interest at the rate of ten per cent. per annum on the notes. Ten per cent. is not an unlawful rate of interest in Tennessee. It may be reserved, if the parties so agree. If they make no agreement, the law gives six. The agreement to pay ten per cent. in this case may not be binding on the wife personally, but it is not binding on the same ground that the principal is not binding upon her personally. Nevertheless, as it is a rate that may be lawfully stipulated for — if it is stipulated for, and is made part of the consideration for which a lien is retained on the land,—it is as much secured by the lien as the principal is.

We see no error in the decree, and it is therefore affirmed.

SLAUGHTER v. GLENN.

(8 Otto, 242-248. 1878.)

APPEAL from U. S. Circuit Court, Western District of Texas.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—There is a considerable mass of testimony in the record, but the facts are few, and we think there is nothing material about which there is any room for doubt.

In the year 1863, and for some years previous, the appellant, Mrs. Slaughter, had owned in her own right the premises in controversy in this case. She was a widow when she married Slaughter, and then possessed the property. It is situated in Marion county, in the state of Texas. The land was poor and the place very unhealthy. In the spring of that year, Dunn & Co. were desirous to put up a packing establishment, and were looking for property to buy with that view. Her agent offered the premises in question. At his request Dunn called upon her. She asked \$8,400. Dunn & Co. agreed to give it, and paid her in Confederate money. On the 21st of July, 1863, the payment was completed, and she executed a deed to the purchasers. She was the sole grantor, and the certificate of acknowledgment was silent as to any separate and privy examination. The certificate is as if she were a *feme sole*. Gray, the officer who took the acknowledgment, testified as follows:

"I witnessed and attested said deed at the request of Mrs. E. J. Slaughter, the maker thereof. I took her acknowledgment to said deed. I asked her if she acknowledged it to be her act and deed, for the uses, purposes and considerations as therein stated and expressed; she answered that she did. I cannot remember positively what other questions were propounded to her or what answers were made, but I think I asked all the questions usually asked by county clerks in taking acknowledgments, as required by the statute. She

signed the deed, after an explanation of its contents made by me to her. Her husband, M. T. Slaughter, was at that time absent in the army. After the examination and explanation of the contents to her by me, she signed the deed, and acknowledged it to be her act and deed. She acknowledged it, so far as I could tell, freely and willingly.

"At the time of the making the deed M. T. Slaughter was absent. He had been absent about four months, not less than four months. He was a soldier in the Confederate army. He was absent for more than twelve months; I cannot remember positively how long."

About the time the transaction was closed she bought another tract of land situate in the neighborhood, and paid for it out of the money she had received from Dunn & Co. A deed to her was duly executed on the 3d of August following. The tract is fully described in the bill, and a copy of the deed is in evidence. The property was known as the Culbertson farm. Before selling and buying, she consulted with her friends, and they earnestly advised both as highly advantageous.

The firm of Dunn & Co. consisted of Dunn and Price. Price sold and conveyed to Dunn his share of the premises in controversy, and Dunn sold and conveyed the entire premises to Joseph Glenn, since deceased.

On the 26th of May, 1863, the appellant, M. T. Slaughter, left his home, and entered into the Confederate military service in the state of Louisiana. He lost an arm by a casualty of the war, and thereupon returned home and remained there. He was absent about a year. He had no means. His wife had considerable property. During his absence she managed and controlled everything as if she had been a *feme sole*. His ever returning depended upon the chances of the war. Upon getting back, he expressed himself as highly gratified by the sale and purchase she had made. She had constantly done the same thing. On the 3d of June, 1868, Slaughter and wife conveyed an undivided half of the premises in controversy to one of their counsel in the court below, with a special covenant against all persons claiming under them. By the same instrument it was provided that the learned gentleman should prosecute a suit for the recovery of the premises without any other compensation, and that in the event of defeat he should pay all costs and damages and save his clients harmless. An action of trespass to try title was instituted in the proper state court, in the name of Slaughter and wife. Glenn thereupon filed this bill to quiet his title. Upon his application, both cases were removed to the circuit court of the United States. That court decreed a perpetual injunction in the action at law, and the equity case has been brought here for review.

The controversy between the parties is to be decided according to the jurisprudence of Texas. We must administer the law of the case in all respects as if we were a court sitting there, and reviewing the decree of an inferior court in that locality. *Olcott v. Bynum*, 17 Wall., 44.

The case on the part of the appellants wears the appearance of a conspiracy to defraud, which, to say the least, does not commend it to the favorable consideration of a chancellor. A court of equity must find itself hard pressed in the other direction to refuse the relief sought by the bill upon the facts disclosed in the record. We do not find ourselves embarrassed by any such considerations. The only objections taken by the appellants to the title of the appellees' testator are that Slaughter was not a party to the deed of his wife to Dunn & Co., and that the certificate of her acknowledgment does not con-

form to the requirements of the statute of the state touching deeds by married women of their own property. Before considering that subject, it is proper to advert to two other points which arise upon the record.

§ 246. *Whether a married woman must refund all that she has received under a contract before she can be permitted to rescind it.*

All the means, legal and equitable, which Dunn had of protecting his title, passed by assignment under his deed to Glenn. *Kellogg v. Wood*, 4 Paige, 578. Mrs. Slaughter paid for the Culbertson farm entirely out of the proceeds of the property which she conveyed to Dunn & Co., and there was an overplus left in her hands. If we were constrained to hold that she is entitled to recover back those premises, it would then have to be considered whether she should not be regarded as a trustee *ex maleficio*, and required to convey to the appellees, as representing Glenn, the Culbertson farm, in which the money of Dunn & Co. was invested. *Oliver v. Piatt*, 3 How., 333; *May v. Le Claire*, 11 Wall., 217.

Again, it is the settled law of Texas that if an infant convey, and after coming of age choose to rescind, he must, as a general rule, restore what he has received, before he will be permitted to recover; and the same rule is applied to married women under like circumstances. *Womack v. Womack*, 8 Tex., 397. But it is unnecessary to pursue these views, because we find the propositions of the appellants touching the execution of the deed to Dunn & Co. wholly untenable.

§ 247. *The law of Texas as to the "separate real estate" of married women stated.*

The common law rights and powers of *femes covert* have been considerably modified in Texas. There, real estate belonging to her, whether acquired by descent or purchase in the usual way, is termed, though not technically so, her "separate property," and she has in equity all the power to dispose of it which could be given to her by the amplest deed of settlement. The statute regulating conveyances to pass the legal title is not unlike those of most of the other states. It provides that the "husband and wife having signed and sealed any deed or other writing purporting to be a conveyance of any estate or interest in any land, slaves, or other effects, the separate property of the wife, . . . if the wife appear before any judge," etc., "and being privily examined by such officer apart from her husband, shall declare that she did freely and willingly sign and seal the said writing, to be then shown and explained to her, and wishes not to retract it, and shall acknowledge the said deed or writing so again shown to her to be her act, thereupon such judge or notary shall certify such privy examination, acknowledgment, and declaration, under his hand and seal, by a certificate annexed to said writing, to the following effect or substance, viz., " etc. The form is then given. 1 Laws of Texas (4th ed.), p. 261, art. 1003.

§ 248. *It is not indispensable in Texas that the conveyance by the wife of her separate property should strictly follow the statute.*

In the administration of this statute by the courts of the state a singular anomaly has grown up. The following adjudications will show the changes in the common law and the anomaly to which we have referred. In *Womack v. Womack*, *supra*, a husband and wife conveyed a slave belonging to her, and warranted the title. There was no certificate of acknowledgment. The court said the statute which prescribed the mode of conveying did not declare void any other mode, and that it seemed, "from its terms, to have but one object

in view, and that was to secure the freedom of will and action on the part of the married woman. If she was free to act, and so declared it, and that she did not retract, all the circumstances concurred which were made necessary to pass the title to the property." The deed was held to be valid.

In *Wright v. Hays*, 10 Tex., 130, the husband was from home, at a distance, for nearly six years. During his absence his wife visited him. At the end of that time he returned home and remained there. In the meantime the wife bought land, took the title in her own name, and conveyed a part of it to her son by a former husband. After her death, suit was brought to defeat the conveyance. The same objections were made to the deed as here. The court said: "The joining of the husband in the wife's conveyance, her privy examination and declaration that she acts freely, all presupposes that a husband is present and may be exercising undue influence over her. But can these formalities be requisite in cases where the rights of the wife (and they are acknowledged by law) depend upon the supposition that *de facto* she has no husband?" The deed was sustained, and judgment was given for the defendant.

In *Dalton v. Rust*, 22 Tex., 133, the vendors had given a title bond to the vendee for a tract of land described by metes and bounds. The vendee died before making full payment. The vendors filed a petition in the county court for the sale of the premises and the payment of the balance due. A sale was accordingly made, and the amount due paid out of the proceeds. The purchaser sued to recover possession, according to the metes and bounds set forth in the bond. One of the vendors set up as a defense that she was, when she executed the bond, and had continued to be, a married woman, and that she did not acknowledge the bond according to the requirements of the statute. It was held that she was estopped by the proceedings in the county court and the receipt of the purchase money from denying the validity of the bond, or the right of the purchaser to all the lands within the metes and bounds set forth in the original contract which she had executed. She was treated in all respects as if she had been a *feme sole* from the outset.

In *Clayton v. Frazier*, 33 Tex., 91, the plaintiff sued the heirs of a married woman for the title to land which had been her property, and for the conveyance of which, on the payment of the purchase money, she and her husband had given a bond. There had been no examination of the wife as to her voluntary execution of the bond. It was held that the case was a proper one for specific performance. *Womack v. Womack* and *Dalton v. Rust* were cited and approved. This is the latest authoritative adjudication in that state upon the subject to which our attention has been called. These authorities require no comment. The propositions which they establish are decisive of the case before us.

Decree affirmed.

FRIEDLANDER v. JOHNSON.

(Circuit Court for Mississippi: 2 Woods, 675-680. 1875.)

STATEMENT OF FACTS.—Complainants filed this bill to subject to the payment of Johnson's debt to them a certain plantation of which the legal title stood in the name of Mrs. Johnson. Years ago Johnson had bought the plantation, paid for it with his wife's money, and taken the title in his own name. Long afterwards Mrs. Johnson, who had considerable separate property, formed a partnership in business with Howard, who bought the plantation from John-

son, and upon the settlement of the partnership affairs Howard conveyed the title to Mrs. Johnson. There was no pretense that either the conveyance to Howard or from him to Mrs. Johnson was fraudulent.

§ 249. *Equities of the respective parties to the bill compared.*

Opinion by BRADLEY, J.

A clearer equity of a wife has rarely been shown in a court of justice. Unless prevented by some technical rule from having her rights, so far as the property in question is concerned, she must prevail in this suit. Technical law is cited to show that a resulting trust could not arise in favor of Mrs. Johnson, when her husband originally purchased the property from Hogan. But she does not stand on a resulting trust. She has the legal estate and does not seek the benefit of any such trust. The complainants have come into the court to press an equity which they claim to have against Mrs. Johnson. They come subject to the rule that he who asks equity must do equity. Whether Mrs. Johnson had or had not a resulting trust, which she could have enforced, is not material. Her money or her property went to the purchase of this plantation. She was equitably entitled to be repaid or secured out of her husband's estate. He placed Howard's note in her hands for this purpose; with this note she acquired the legal estate in the land. Surely her equity to keep it is greater than the complainants' equity to take it from her.

§ 250. *Where a husband borrows or uses his wife's money he becomes a trustee for her.*

It is well settled that if a husband borrow or use his wife's money or estate for his individual purposes, he becomes equitably indebted to her, and may secure her by payment or pledge, or in any other proper way. See 2 Story's Eq., §§ 1404-1415, and *Sykes v. Chadwick*, 18 Wall., 141. This is all that was done in this case.

§ 251. *Bearing of Mississippi statute as to resulting trust considered, where creditors gave credit to the husband without notice of the trust for his wife's use.*

We are met, however, by the statute of Mississippi, which declares that "if the husband shall purchase property in his own name with the money of his wife, he shall hold the same only as trustee for her use; but such trust shall be void as against creditors of the husband, who contracted or gave credit in consequence of the possession of such property without notice of the trust." Code, 376. The complainants claim the benefit of this law. They allege that the property in question, though purchased with the wife's money in 1856, stood in the husband's name until 1866, and that they gave him credit on the faith of his ownership thereof, without notice of the trust. This plea cannot avail the complainants unless they can prove that the conveyance to Howard was a fraudulent one, intended to cheat them. For, if the conveyance to Howard was valid, then the title of Mrs. Johnson is unimpeachable, if she was equitably entitled to the note of Howard, which her husband transferred to her. From the evidence in the case, it would have been difficult for the complainants to attack the title of Howard. Johnson may have sold the property to him because he was largely in debt, and in order to have its proceeds in more manageable shape in case of being pressed by his creditors. But there is no evidence that it was not sold for its full value, or that Howard did not purchase it in good faith. If this was the case, there was no law to prevent its sale. The bankrupt law, if it would have affected the transaction, had not then been passed. At all events, the complainants never did attack it,

although they recovered judgment against Johnson in November, 1866, and failed to collect anything thereon.

But, aside from this consideration, it is questionable whether the statute referred to can fairly be quoted by the complainants in their favor. By the decisions of the supreme court of Mississippi, it would seem that a reliance on property thus situated, namely, purchased with the wife's money, in order to give the husband's creditors a priority over the wife, must be a special and specific reliance, giving actual credit to that particular property. Thus, in *Butterfield v. Stanton*, 44 Miss., 26, it is laid down with regard to the statute in question as follows:

1. "That it is exceptional and almost penal, as to the wife, in declaring a trust to her use void, in the contingency stated. This statute ought therefore to be strictly construed.

2. "Though the statute declares the trust void as to a class of creditors, it creates no lien on the property. The property thus subjected to their debts is bound only as other property, there being no lien until one is obtained by judgment, mortgage or otherwise. There is none *per se*.

3. "The trust provided for in this statute is available to the wife except as to those creditors giving credit on account of this particular property. To benefit creditors, the contract of credit ought, therefore, to be based upon it, and it ought in some way to be defined or distinguished by the parties at the time of the credit. It should be definitely made to appear that the particular property was the occasion of the credit."

Now, in the present case, Johnson, at the time the complainants gave him credit for their present claims against him, was in possession of other property to a large amount, and was producing large annual crops which were disposed of through the agency of the complainants as his commission merchants. It cannot be pretended that they gave any such special credit to the particular property in question, as is mentioned and required in the foregoing abstract of the decision referred to. On the contrary, in March, 1861, when the complainants were taking security from Johnson for his then indebtedness to them, amounting to over \$12,000, they took from him a trust deed on other property standing in his name, together with certain slaves, and did not take any lien on the property in question. It is true, they say that they supposed that the latter property was included in that trust deed; but this is denied by Johnson, and no evidence is offered to sustain the statement.

As to the position that a resulting trust only arises when actual money of another is used in the purchase of property, and not when other assets are so used, it has no foundation in reason or authority. The plea that the wife gave her consent to the use of her slaves and other property, in purchasing property in her husband's name, cannot avail in this case, because, even if she did give such consent, and if she was bound by it (which under her peculiar circumstances may be doubted), she, at any rate, became a creditor of her husband to the amount thus appropriated, and this was a good consideration for the note of Howard, which she received, and with which she obtained the deed for the property which she now holds.

In any point of view in which the case may be considered, we are always met by the wife's equity standing out in bold relief, and dominating every claim which the complainants may assert in their favor. Bill dismissed.

ADAMS v. ADAMS.

(21 Wallace, 185-196. 1874.)

APPEAL from the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.— This was a suit to enforce a trust created by a deed executed August 13, 1861, by one Adams and wife to one Appleton, in fee, as trustee, for the wife's sole and separate use for life, the trustee having power to sell and convey the property as the wife might direct. The deed contained other provisions which it is unnecessary to refer to here. After the execution of the trust deed the husband and wife were divorced, and the husband being in possession of the premises conveyed by said deed, and denying that any trust was ever created; and Appleton, on the wife's request, declining to assert the trust or to act as trustee, Mrs. Adams filed a bill in the court below against them both, to establish the deed and to have another trustee appointed in Appleton's place. The court sustained the trust, appointed a new trustee, and ordered the husband to deliver the deed and the possession of the premises, and to account for rents and profits.

Opinion by MR. JUSTICE HUNT.

The first question in this case is whether there was a delivery of the deed of August 13, 1861. If not a formal ceremonious delivery, was there a transaction which, between such parties and for such purposes as exist in the present case, the law deems to be sufficient to create a title? The bill avers that the deed was delivered by the parties and put on record in the way in which it states.

The answer is responsive to the allegations in the plaintiff's bill, that the deed, after being signed, sealed and delivered, was recorded at the request of the defendant, Adams, and at his expense. The burden is thus imposed upon the plaintiff of maintaining her allegation by the proof required, where a material allegation in the bill is denied by the answer.

It is evident, however, that the apparent issues of fact and seeming contradictions of statement become less marked by looking at what the parties may suppose to constitute a delivery. That the defendant signed and sealed the deed he admits. That with his wife, the present plaintiff, he acknowledged its execution before two justices of the peace, and that the deed thus acknowledged by him not only purported by words *in presenti* to grant, bargain and convey the premises mentioned, but declared that the same was signed, sealed and delivered, and that this deed, with these declarations in it, he himself put upon the record, is not denied. If these facts constitute a delivery under circumstances like the present, then the defendant, when he denies that a delivery was made, denies the law simply.

Mrs. Adams and two other witnesses were examined. None of Mrs. Adams' statements are denied by Mr. Adams. He was as competent to testify as she was. So, although time, place and circumstances are pointed out in the testimony of one of the other witnesses, the defendant makes no denial of the statement; nor does he deny the statement of the other witness giving her conversation with him, in detail, in which she says that he admitted the trust.

The deed corresponded substantially with the intention which these witnesses state that Adams expressed. Should the property be sold by the order of Mrs. Adams, the money received would be subject to the same trusts as the land, to wit, for the use of Mrs. Adams during her life-time and her chil-

dren after her death. It would not by such transmutation become the absolute property of Mrs. Adams.

Upon the evidence before us we have no doubt that the deed was executed, acknowledged and recorded by the defendant with the intent to make provision for his wife and children; that he took the deed into his own possession with the understanding and upon the belief on his part that he had accomplished that purpose by acknowledging and procuring the record of the deed, by showing the same to his wife, informing her of its contents, and placing the same in the house therein conveyed in a place equally accessible to her and to himself. The defendant now seeks to repudiate what he then intended, and to overthrow what he then asserted and believed he had then accomplished.

§ 252. *The refusal of the trustee named to accept the executed deed or act as trustee will not defeat the trust.*

It may be conceded, as a general rule, that delivery is essential, both in law and in equity, to the validity of a gift, whether of real or personal estate. 12 Ves., 39, and note, *Antrobus v. Smith*. What constitutes a delivery is a subject of great difference of opinion, some cases holding that a parting with a deed, even for the purpose of recording, is in itself a delivery. *Cloud v. Calhoun*, 10 Rich. Eq., 362. It may be conceded also to have been held many times that courts of equity will not enforce a merely gratuitous gift or mere moral obligation. *Id.*

These concessions do not, however, dispose of the present case. 1st. We are of opinion that the refusal of Appleton in 1870 to accept the deed or to act as trustee is not a controlling circumstance. Although a trustee may never have heard of the deed, the title vests in him, subject to a disclaimer on his part. *Cloud v. Calhoun*, 10 Rich. Eq., 362. Such disclaimer will not, however, defeat the conveyance as a transfer of the equitable interest to a third person. *Lewin on Trusts*, 152; *King v. Donnelly*, 5 Paige, 46. A trust cannot fail for want of a trustee, or by the refusal of all the trustees to accept the trust. The court of chancery will appoint new trustees. *Id.* The case turns rather upon the considerations next to be suggested.

§ 253. *Circumstances considered as to delivery of a deed executed in the wife's favor; and held that a valid trust was established for her separate benefit.*

2d. By the transactions already detailed and by the declarations of Mr. Adams, already given, was there created a trust which the parties benefited are entitled to have established by a court of chancery?

Mr. Lewin in his work on Trusts, page 55 (4th ed., 1861), thus gives the rules on this subject: "On a careful examination the rule appears to be that whether there was transmutation of possession or not the trust will be supported, provided it was in the first instance perfectly created. . . . It is evident that a trust is not perfectly created where there is a mere intention or voluntary agreement to establish a trust, the settlor himself contemplating some further act for the purpose of giving it completion. . . . If the settlor propose to convert himself into a trustee, then the trust is perfectly created, and will be enforced so soon as the settlor has executed an express declaration of trust, intended to be final and binding upon him, and in this case it is immaterial whether the nature of the property be legal or equitable. . . . Where the settlor purposes to make a stranger the trustee, then, to ascertain whether a valid trust has been created or not, we must take the following distinctions: If the subject of the trust be a legal interest and one capable of legal trans-

mutation, as land, or chattels, etc., the trust is not perfectly created unless the legal interest be actually vested in the trustee."

To these positions numerous authorities are cited by the learned author. In the case before us the settlor contemplated no further act to give completion to the deed. It was not an intention simply to create a trust. He had done all that was needed. With his wife he signed and sealed the deed. With her he acknowledged it before the proper officers, and himself caused it to be recorded in the appropriate office. He retained it in his own possession, but where it was equally under her dominion. He declared openly and repeatedly to her and to her brothers and sisters, that it was a completed provision for her, and that she was perfectly protected by it. He intended what he had done to be final and binding upon him. Using the name of his friend as trustee, he made the placing the deed upon record, and keeping the same under the control of his wife as well as himself, a delivery to the trustee for the account of all concerned (*Cloud v. Calhoun*, 10 Rich. Eq., 362), or he intended to make himself a trustee by actions final and binding upon himself.

Adopting the principles laid down by Mr. Lewin, the plaintiff has established her case. Mr. Hill, in his work on Trusts, lays down the rule in these words, in speaking of a voluntary disposition in trust: "The fact that the deed remains in the possession of the party by whom it is executed, and that it is not acted upon, or is even subsequently destroyed, will not affect its validity, unless there are some other circumstances connected with the transaction which would render it inequitable to enforce its performance." To this he cites many authorities. After quoting many other cases, the author adds (page 136): "It would seem to follow from the foregoing decisions that the court will in no case interfere to enforce the performance of a voluntary trust against its author if the legal interest in the property be not transferred or acquired as part of the transaction creating the trust. The doctrine of the court, however, does not, in fact, appear to be so confined. If a formal declaration of trust be made by the legal owner of the property, declaring himself in terms the trustee of that property for a volunteer, or directing that it shall be held in trust for the volunteer, the court will consider such a declaration as a trust actually created, and will act upon it as such."

The author says again: "It will be seen that it is difficult to define with accuracy the law affecting this subject. The writer conceives that he is warranted in stating the following propositions to be the result of the several decisions: 1. Where the author of a trust is possessed of the legal interest in the property, a clear declaration of trust contained in or accompanying a deed or act which passes the legal estate will create a perfect executed trust, and will be established against its author and all subsequent volunteers claiming under him. 2. A clear declaration or direction by a party, that the property shall be held in trust for the objects of his bounty, though unaccompanied by a deed or other act divesting himself of the legal estate, is an executed trust, and will be enforced against the party himself, or representatives, or next of kin after his death." Upon the principles laid down by this author the plaintiff's case is made out.

It will be necessary to refer to a few only of the American authorities. In *Bunn v. Winthrop*, 1 Johns. Ch., 329, which was the case of a voluntary trust created in certain real estate in the city of New York, Chancellor Kent says: "The instrument is good as a voluntary settlement, though retained by the grantor in his possession until his death. There was no act of his at the time

or subsequent to the execution of the deed which denoted an intention contrary to the face of the deed. The cases of *Clavering v. Clavering*, 2 Vern., 473; 1 Brown's Parl. Cases; 122, of *Boughton v. Boughton*, 1 Atk., 625, and of *Johnson v. Boyfield*, 1 Ves. Jr., 314, I had occasion lately to consider in the case of *Souverby v. Arden*, and they will be found to be authorities in favor of the validity and operation of deeds of settlement, though retained by the grantor under circumstances much less favorable to their effect than the one now under consideration."

In *Souverby v. Arden*, 1 Johns. Ch., 255, which was a bill against the father to enforce a voluntary settlement of real estate upon the daughter, made by the father and by the mother, then deceased, the same learned judge says:

"If we recur to the adjudged cases and the acknowledged rules of law on this subject, they will be found in favor of the valid operation of this deed, whether the actual delivery was to the plaintiff or to her mother (the mother being one of the grantors). This is much stronger and attended with more circumstances of a due delivery than *Shelton's Case*, Cro. Eliz., 7. In that case a deed was sealed in the presence of the grantee and others, and was read but not delivered, nor did the grantee take it, but it was left behind in the same place, and yet in the opinion of all the justices it was a good grant; for the parties came together for that purpose, and performed all that was requisite for perfecting it except an actual delivery; being left behind, and not countermanded, it was held to be a delivery in law. In the ancient authorities, and at a time when the execution of deeds was subjected to great formality and strictness, it was admitted that if A. execute a deed to B., and deliver it to C., though he does not say to the use of B., yet it is a good delivery to B., if he accepts of it, and it shall be intended that C. took the deed for him as his servant. . . . A voluntary settlement, fairly made, is always binding in equity upon the grantor, unless there be clear and decisive proof that he never parted, nor intended to part, with the possession of the deed; and even if he retains it, the weight of authority is decidedly in favor of its validity, unless there be other circumstances beside the mere fact of his retaining it, to show it was not intended to be absolute. This will appear from an examination of a few of the strongest cases on each side of the question." He then goes into an examination of the decided cases, for which it is only necessary to refer to the case itself.

The defense rests upon the alleged non-delivery by Mr. Adams of the deed of August 13, 1861, to Mrs. Adams, or for her benefit. We have referred at length to the authorities which show that as matter of law the deed was sufficiently delivered, and that it is the duty of the court to establish the trust. We think that the decree of the court below was well made, and that it should be affirmed.

BANK OF AMERICA v. BANKS.

(11 Otto, 240-247. 1879.)

ERROR to U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Married women, as the code of the state provides, may rent their lands or make any contract for the use of the same, and may loan their money and take securities for its payment, and employ it in trade or business; and the express enactment is that all contracts made by the hus-

band and wife, or by either of them, to obtain supplies for the plantation of the wife, may be enforced and satisfaction secured out of her separate estate. Provision is also made that when a married woman engages in trade or business as a *feme sole*, she shall be bound by her contracts made in the course of such trade or business in the same manner as if she was unmarried. Code (Miss., 1871), sec. 1780.

Sufficient appears to show that Virginia Banks, one of the defendants, is a married woman, and that A. D. Banks, the other defendant, is her husband; that they executed three promissory notes, each for the sum of \$2,000, payable to their own order, and that they indorsed the same in blank; and that the Bank of America, the plaintiff, is the lawful holder of the several notes. Payment being refused, the plaintiff instituted the present suit, and prays judgment for the amount against her separate property.

Process having been served, the defendants appeared and pleaded three pleas in answer to the declaration: 1. That they never promised in manner and form as alleged. 2. That they had fully paid and satisfied the notes before the suit was instituted. 3. That said Virginia, when the notes were made and indorsed, was a married woman, and that the same were made and indorsed by her as the surety and accommodation indorser of her husband, for the purpose of enabling him to obtain money to carry on a plantation cultivated by him and not by his wife, and that the notes were not made and indorsed in payment of money and supplies furnished to the wife to enable her to cultivate a plantation belonging to her as her separate property, in accordance with a contract made to that effect with the plaintiff, and that the notes and indorsements as to her are without legal consideration, and that she is not liable to pay the same.

Prepayment was denied by the bank. In its replication to the third plea of the defendants, it avers that the notes described in the declaration were not made and indorsed by the wife as an accommodation surety for the husband, as alleged in the third plea. Instead of that, it alleges that the notes were made and indorsed by her in payment of necessary plantation supplies to enable her to cultivate her separate plantation; that the same were furnished and delivered to her by certain commission merchants; and that the notes were given for the payment of such plantation and family supplies and necessities for family use as a married woman is allowed by law to purchase on credit and to bind her separate estate therefor.

Leave to amend the declaration and replications was subsequently granted to the plaintiff, and it appears that amended counts were filed in pursuance of the authority granted; but it is not necessary to reproduce the new pleadings, as they do not vary the material issues between the parties. Continuance followed, when the parties entered into a stipulation to waive a jury, and that the matters of fact, as well as of law, should be tried by the court. Hearing was had, and the findings of the circuit court are as follows: 1. That the husband was discharged before the commencement of the suit from all liability upon the notes, as alleged in his plea. 2. That said Virginia was a married woman at the time she executed the notes, and the wife of the other defendant, as averred in defense. 3. That the notes were executed not to secure any existing indebtedness, but as a security for such advances in money and supplies as the parties to whom the notes were delivered might thereafter make upon the order of the husband for plantation purposes. 4. That the parties

to whom the notes were delivered did thereafter make large advances to the husband, in money and supplies, that remain unpaid, of which an amount as large in value as the aggregate of the three notes was forwarded to the parties and used in the cultivation of two plantations owned by the wife and her two children by a former marriage; that the husband was cultivating those two plantations during the year in question, on his own account and in his own name, under a verbal contract of lease made by him with his wife for a stipulated money rent. 5. No proof was exhibited that the parties to whom the notes were delivered or the plaintiff knew whether the wife was or was not interested in such plantation enterprise; but the court finds that they did know of her interest in the property of the plantations, and that the whole of the account was kept in the name of one of the plantations, and that it contained many items for supplies furnished for another plantation in the cultivation of which the husband was interested, and other items having no relation to plantation matters. 6. That a deed of trust of one of the plantations was executed by the husband and wife contemporaneously with the making of the notes to secure the payment of the same, in which it is recited that it is made to secure the indebtedness of the wife. Based on these findings, the circuit court rendered judgment for the defendants; and the plaintiff excepted, and sued out the present writ of error. All the facts are found by the court, and the only error assigned is that the court misapplied the law to the facts.

§ 254. *Common law of husband and wife, with reference to the wife's property, stated.*

Marriage, by the rules of the common law, gave the husband a freehold tenure in the estates of inheritance in land of the wife, and the right to the rents and profits during their joint lives. During coverture the husband must sue in his own name for any injury to the profits of the land, but for an injury to the inheritance it was required that the wife must join in the action. 2 Kent, Com. (12th ed.), 131.

Money, goods and personal chattels in possession vested absolutely in the husband, and became his property as completely as property purchased with his own money; and such property never went back to the wife unless given to her by the husband in his life-time or by his will, and in case of his death it vested in his executors. Choses in action did not vest absolutely in the husband, but he acquired the power to sue for and recover or release or assign the same, and when recovered and reduced to possession, and not otherwise, the money in most cases became absolutely his own.

Husband and wife during coverture were regarded as one person at common law in most respects, from which it followed as a general rule that the wife could neither sue nor be sued without joining her husband. Great changes in the rules of the common law in that regard were made, even before the colonies separated from the parent country. Deeds of indenture in transferring the real property of the wife, with the consent of the husband, were substituted in the place of fine and recovery; and when it became settled that the wife might hold a separate estate, many other exceptions to the rule that she could neither sue nor be sued without joining the husband were sanctioned by judicial authority.

Exceptions almost without number have been admitted by the courts, and many more have been added to the catalogue by legislation, until in some jurisdictions it is difficult to say that there is anything left of the ancient rule.

Questions of the kind in the state of Mississippi depend almost entirely upon statute regulations and the decisions of the state courts in construing those provisions.

§ 255. *Mississippi legislation, touching the separate property of married women, stated.*

Contracts made by the wife at the period mentioned in the declaration, or by the husband with her consent, for family supplies or necessities, including wearing apparel of herself and of her children, or for their education, or for buildings on her land or premises and the materials therefor, or for work and labor done for the use, benefit or improvement of her separate estate, were by statute declared to be binding on her, and that satisfaction might be had for the same out of her separate property. Code 1857, sec. 25, p. 336.

Supplies for the comfort, convenience and maintenance of the family and the education of her children must be contracted for by the wife, and, if not purchased directly by her but by the husband, they impose no liability on her separate property, unless the husband had her consent to act. Unlike that, the rule is that supplies for her plantation, or for the repairs or improvement of her separate estate, or for work, labor and services in cultivating the same, the contracts may be made by husband and wife, or either of them. *Clopton v. Matheny*, 48 Miss., 286, 295.

Orders for supplies to her plantation, if filled, bind the separate property of the wife, whether bought by herself or her husband with or without her consent, the rule being in that state that the husband is for that purpose the agent of the wife *in invitum*, and that he is made so by legislative enactment. Code 1871, sec. 1780; *id.*, 1857, 336. Her separate estate is bound for such supplies, even when purchased by the husband without her direction. *Cook v. Ligon*, 54 Miss., 368, 373.

Nothing, say the court in that case, will discharge her estate save an express contract that it shall be released, or something equivalent to it. Neither the acceptance of the note of the husband nor the recovery of the judgment on such note will have that effect. Plantation supplies may include money advanced for the purpose of purchasing the same,—farming utensils, working stock, or other things necessary for the cultivation of a farm or plantation, which latter designation must depend upon the usage and custom of agricultural pursuits. *Herman & Co. v. Perkins*, 52 *id.*, 813.

§ 256. *A married woman in Mississippi may rent her land to any one, her husband included.*

Express statutory provision exists in the state that a married woman may rent her lands or make any contract for the use thereof; and may loan money in her own name, take securities therefor, and employ it in trade or business; and it is equally clear that she may rent her separate estate to her husband as well as to strangers. *Robinson v. Powell*, Sup. Court Miss., not reported.

Beyond doubt, the two plantations belonged to the wife and her two children by a former marriage, but it is equally certain that the husband cultivated the same during the year in question on his own account and in his own name, under a verbal contract of lease made by him with his wife for a stipulated money rent. Supplies for the plantation of the wife, whether purchased by her or by the husband, bind her separate estate; and, if she had cultivated these two plantations during the year referred to, the plaintiff would be correct; but the finding of the circuit court shows conclusively that she did not cultivate either of them during that year. Her authority to lease the premises

is not denied, and the finding of the court establishes the fact that she did not cultivate either plantation during the period when these supplies were furnished.

§ 257. *A wife's separate estate is not bound for supplies furnished for premises of hers while leased to her husband and cultivated on his account.*

Leased premises cultivated by the husband in his own name, and for his own benefit, are not plantations of the wife, within the meaning of the section of the statute which enacts that all contracts made by the husband and wife, or by either of them, may be enforced, and satisfaction had out of her separate estate. Code, 1871, sec. 1780; Code, 1857, p. 336. Nor is the contract in this case one made by the husband with the consent of the wife, which may also be satisfied out of her separate property. Nothing of the kind is pretended; and, if it were, it could not be supported for a moment, as the findings of the court do not contain anything to give such a proposition the least countenance whatever.

§ 258. — *the creditor furnishing such supplies must ascertain at his own peril on whose account the plantations are cultivated.*

Suppose the plantations were leased to the husband, and were cultivated by him that season in his own name and for his own benefit, still it is suggested by the plaintiff that neither the party to whom the notes were delivered nor themselves had any knowledge of the lease, or that the husband purchased the supplies without the consent of the wife or authority of law. Even if that be conceded, it will not benefit the plaintiff, as it only shows that it acted improvidently and without due caution, the settled decision of the courts of the state being that the provision that makes the husband the agent of the wife to purchase plantation supplies for her plantation applies only to those plantations which are cultivated for the wife's account and benefit, and not to those she has leased, and which are in the possession and under the control of the tenant. *Grubbs v. Collins*, 54 Miss., 485, 489.

Enough appears in the findings of the court to show that the plantations were in the exclusive control of the husband, and that the supplies were procured for the use of his employees, and that they were not plantation supplies for account or benefit of the wife. Neither the words of the statute nor the decisions of the state courts permit such a contract to be enforced against the separate property of the married woman. In order that the contract may bind the separate property of the wife, she must be the beneficiary of the cultivation, and the supplies must in fact have been purchased for her account and benefit. Her plantation, says Simrall, C. J., is the predicate of her power to make the contract, and, he adds, that a false representation that she has such property will not estop her from averring that the fact is otherwise.

Nor does the statute oblige her to pay for property purchased on credit, the rule being that such an obligation cannot be enforced. Contracts made in the purchase of supplies for the cultivation of her own plantation, where the cultivation is on her own account and for her own benefit, may be enforced against her separate property. Previously, says the chief justice, the word was used by the law-maker to include all those things required and used by the planter in the production and preparation of the crops for consumption and sale.

§ 259. *A wife's separate estate not liable for food and raiment of family.*

If it be said that the family must be supported, and that the term ought to embrace food and raiment for them, the answer to the suggestion is furnished

by a subsequent part of the same section, which provides that supplies, necessities and conveniences for the family are not necessarily chargeable on the wife's property. She is not liable for such expenses unless she bargains to be, or unless the husband, with her consent, buys them on her account. *Wright v. Walton*, Sup. Court Miss., not yet reported. Verbal contracts of lease, not exceeding the term of one year, are valid by the laws of the state. Code, 1871, sec. 2892.

§ 260. *The law of estoppel as relating to married women.*

Much discussion of the question of estoppel is unnecessary, as it is clear that a married woman cannot, by her own act, enlarge her capacity to convey or bind her separate estate. *Palmer v. Cross*, 1 Smed. & M. (Miss.), 46. Facts recited in an instrument may be controverted by the other party in an action not founded on the same instrument, but wholly collateral to it. Recitals of the kind may be evidence for the party instituting the suit, but they are not conclusive. *Carpenter v. Buller*, 8 Mees. & W., 209, 213; *Herman, Estoppel*, sec. 238; *Lowell v. Daniels*, 2 Gray (Mass.), 161, 169; *Champlain v. Valentine*, 19 Barb. (N. Y.), 485, 488.

In order to work an estoppel, the parties to a deed must be *sui juris* competent to make it effectual as a contract. Hence a married woman is not estopped by her covenants. Plainly the wife was not competent to purchase supplies for the plantation of the husband, and, therefore, cannot be estopped by these recitals. *Bigelow, Estoppel*, 276; *Jackson v. Vanderheyden*, 17 Johns., 167. Viewed in the light of these suggestions, it is clear that there is no error in the record. *Tyler, Inf. and Cov.*, 726.

Judgment affirmed.

§ 261. *Separate estate, how created.*—Where a trust is created for the benefit of a married woman, for the purpose of giving her the separate use and control of lands free from the control of her husband, it will be sustained; since by converting it into a legal estate, and thereby placing the husband in control, its purpose would be defeated. *Bowen v. Chase*, 4 Otto, 812.

§ 262. A conveyance "to the sole and separate use of" the wife, "free and clear from any control or demand of" her husband, and at the same time with another provision to the husband's "sole and separate use, free and clear of the marriage contract," held to exclude the husband's rights altogether. *Marshall v. Beall*,* 6 How., 70.

§ 263. Statement of facts from court below considered as establishing that property purchased and paid for from the wife's money was her separate property. *Davis v. Fredericks*,* 14 Otto, 618.

§ 264. The law of Illinois protecting married women in their separate property. *Kibbe v. Ditto*, 3 Otto, 674.

§ 265. The act of 1861, to protect married women, etc., repeals by implication the saving clause of the act of 1839, relating to married women. *Ibid.*

§ 266. The general rule is that personal property belonging to a woman at the time of her marriage vests in the husband by virtue of the marriage, unless his right is excluded by an express or implied trust. *In re Grant*, 2 Story, 312.

§ 267. According to the equitable doctrine a *feme covert* may hold her separate property and contract with reference to it. *In re Kinkead*, 3 Biss., 409.

§ 268. Under the laws of New York, property the title to which is in the wife cannot be seized to satisfy her husband's debts, without proof that as against his creditors her title is merely colorable and fraudulent. *Voorhees v. Bonesteel*, 16 Wall., 16.

§ 269. Ohio statute of 1861 construed as rendering money received by the wife after the passage of the act as her separate property. But money received by her prior to its passage became the property of the husband, unless the acts accompanying the gift imparted to it the separate character. *In re Wood*,* 5 Fed. R., 443.

§ 270. Cotton is the wife's in Mississippi, whose code maintained the wife's separate estate. *Sykes v. United States*,* 8 Ct. Cl., 330. And in suits under the "abandoned or captured property act," the title which a wife may assert in a court of equity will be protected in the court of claims. *Meriwether v. United States*,* 13 Ct. Cl., 259.

§ 271. The right of a *feme covert* to receive and enjoy a sum of money to her separate use cannot be deemed adequately protected by a suit at common law in the names of herself and husband, and hence it does not fall within the provision of the act barring suits in equity, where there is a plain, adequate and complete remedy at law. *Hunt v. Danforth*, 2 Curt., 592.

§ 272. Where real property is conveyed in trust for the sole and separate use of a wife and her children during her life, with power in her of testamentary disposal, and, in case of failure of such testamentary disposal, remainder to her heirs, a fee-simple thereof is not vested in her, and she cannot, by joining with her husband and trustee, convey a fee-simple to such property. *Green v. Green*,* 23 Wall., 486.

§ 273. Effect of "recording separate property" under the Montana territorial statute considered. *Griswold v. Boley*,* 1 Mont. T'y, 545.

§ 274. Where, pursuant to an agreement between herself and her husband, a change has been made in the form of the investment of the wife's separate estate, the bankruptcy court, on the bankruptcy of the husband, will decree a settlement upon the wife of property acquired with her separate means. *In re Campbell*, 8 Hughes, 276.

§ 275. Separate earnings and trade.—Under the Georgia statute the earnings of the wife's own labor are protected from the husband's creditors, and property derived from such earnings cannot be reached by his assignee in bankruptcy. *Glenn v. Johnson*,* 18 Wall., 476.

§ 276. A married woman authorized by the laws of New York to carry on a separate business and to contract in doing so can contract with the United States for the privilege of a bonded warehouse. *United States v. Garlinghouse*, 4 Ben., 194.

§ 277. Under Colorado statute a married woman may make contracts affecting her business and trade like a single woman, and may execute a note for stock in trade accordingly. *Barnes v. De France*,* 2 Colo. T'y, 294.

§ 278. Under Colorado statutes a married woman is entitled to the proceeds of her own labor, and may sue in her own name to recover compensation. *Allen v. Eldridge*,* 3 Ch. Leg. N., 211.

§ 279. Notwithstanding her disability at the common law, a wife, under Illinois statutes, may not only engage in trade but become the partner of her husband, so as to render the firm a valid partnership to be adjudged bankrupt. *In re Kinkad*,* 3 Biss., 409; 5 Ch. Leg. N., 217; 7 N. B. R., 489.

§ 280. In a state whose legislation permits a wife to carry on the business of distiller on her sole and separate account, a valid bond may be given by her, conditioned according to requirements of the internal revenue law relating to such business. *United States v. Garlinghouse*,* 11 Int. Rev. Rec., 11.

§ 281. Liability of separate estate—Right to sue and be sued.—The separate estate of a married woman is liable for such debts only as were for her personal benefit and about her personal interests or for the purpose of protecting her separate estate. *Pawtucket Institution v. Bowen*,* 7 Biss., 858.

§ 282. A married woman having separate estate in the hands of her trustee may contract debts and bind such estate for the payment. *Simms v. Scott*,* 5 Cr. C. C., 644.

§ 283. A married woman has the same power as a *feme sole* to incur rents settled in trust for her sole and exclusive use and benefit. *Cheever v. Wilson*, 9 Wall., 108 (§§ 585-89).

§ 284. A married woman residing in Massachusetts may, in the absence of her husband from the state, contract as if she were sole. *In re Ruddell*, 2 Low., 124.

§ 285. The statute of Massachusetts gives married women power to contract concerning their separate property, and to sue and be sued, in all matters relating to the same, as if they were sole. *In re Blandin*, 1 Low., 548.

§ 286. In Missouri a married woman may mortgage her real estate. *Parsons v. Denis*, 2 McC., 359.

§ 287. A married woman may sue a common carrier, in New York, for the loss of her wearing apparel, without joining her husband. *Steamboat State of New York*, 7 Ben., 450.

§ 288. Wife's capacity to dispose of her entire separate property by will, under act of 1869, affirmed in the District of Columbia. *Smith v. Thompson*,* 2 MacArth., 291.

§ 289. Connecticut system of 1868, as to married women and their property rights, considered in connection with statute of 1872, which gives a right of action at law upon such contracts as might before have rendered her separate estate liable in equity; and held, that a sole note given by a married woman for the purchase price of stocks which she herself has bought is a debt "contracted for the benefit of" her estate, so as to be suable under that act. *Williams v. King*,* 48 Conn., 569.

§ 290. Under act of congress regulating married women's rights in the District of Columbia, a married woman may sue as if sole in regard to her separate estate. Nor is it necessary for her to allege in her declaration that she is a married woman, and that the action relates to her separate estate, if those facts are disclosed at the trial. *Fiske v. Bigelow*,* 2 MacArth., 427.

§ 291. A married woman, being a shareholder of the stock of a national bank, is bound, as to

her separate estate, to pay assessments made by the comptroller of the currency upon the shareholders of such bank, if it is insolvent. Law of New Jersey as to separate estate of married woman. *Hobart v. Johnson*, 19 Blatch., 359 (CONTRACTS, § 287).

§ 292. Under the charter of a Louisiana bank, *held*, that a married woman could and did bind her estate by jointly borrowing with her husband, whatever might be the general law of Louisiana on that point. *Union Bank of Louisiana v. Stafford*, 12 How., 827; *New Orleans Canal Co. v. Stafford*, id., 843.

§ 293. Wife's employment of husband, etc.—Under the laws of New York a married woman may own property of every description as if single, engage in trade, and even employ her husband in the business, and support him out of its profits. And if conveyance of property is made to her in fulfillment of a *bona fide* agreement between her and the grantor, the husband's assignee in bankruptcy cannot claim the property, although the husband's labor and service made part of the inducement. *Voorhies v. Bonesteel*,* 7 Blatch., 495. Affirmed on appeal, S. C., 16 Wall., 16.

§ 294. Though an insolvent husband cannot give property to his wife, he may give her his personal services, and her estate will not be made chargeable to his creditors. *Dick v. Hamilton*, Deady, 336.

§ 295. A married woman in Michigan may carry on an iron foundry business on her own account and for her own interest, and employ all needed labor, including that of her insolvent husband, without subjecting the business property, standing in her name and purchased by her, to the husband's creditors. *Driggs v. Russell*,* 1 Ch. Leg. N., 353.

§ 296. Husband's use, participation, etc.—When a married woman, living with her husband, permits him to receive the income of her separate estate, it becomes absolutely his, unless there is an agreement between them to the contrary; and such receipt of income is not sufficient consideration to support a conveyance from him to her in fraud of his creditors. *Tarsney v. Turner*,* 2 Flap., 735.

§ 297. Where a husband, with his wife's consent, receives and uses her separate income for many years, equity will not require him to account for more than he received during the last year. *In re Jones*,* 6 Biss., 68.

§ 298. The wife may, by instrument freely and voluntarily executed, direct the whole amount of her separate estate to be paid over to her husband. *Dallam v. Wampole*,* Pet. C. C., 116.

§ 299. A married woman is only bound in matters relating to her separate property, by notice given to her husband, so far as he acts as her agent. *Chew v. Henrietta Mining and Smelting Co.*, 1 McC., 222.

§ 300. What is sufficient in Oregon to charge the separate estate of a married woman for the debt of her husband—note given by wife for debt of husband, with stipulation that it is taken on the credit of her separate estate, is sufficient. *Orange National Bank v. Traver*, 7 Saw., 210.

§ 301. A wife in Massachusetts may contract with her husband as to her separate estate. *In re Blandin*, 1 Low., 544.

§ 302. Mississippi statute concerning the wife's separate property construed with reference to "family supplies and necessities," and *held*, that the wife cannot be bound as the general borrower of money so as to render her separate property liable, on the mere averment that it was afterwards applied as the statute sanctioned. *Boyd v. Withers*,* 1 Ch. Leg. N., 401.

§ 303. A husband can join his wife in an action of trespass *quare clausum fregit*, relating to her separate estate. *Fraser v. Hunter*, 5 Cr. C. C., 470.

§ 304. Trover will not lie against husband and wife for a conversion of goods by them to the use of the wife. *Hollenbach v. Miller*, 3 Cr. C. C., 176.

§ 305. Where a wife's property is conveyed in exchange for other property conveyed to her husband, there is a resulting trust in her favor as to such property so conveyed to her husband. *Nicklin v. Wythe*, 2 Saw. 536.

That the wife's separate property will be protected against the husband's creditors, see § 327

4. Marriage Settlements, Ante-nuptial and Post-nuptial.

SUMMARY—*Marriage articles*, § 306.—*Ante-nuptial settlements and their effect*, §§ 306-314.—*Bequest in lieu of ante-nuptial trust for maintenance*, §§ 315, 316.—*Post-nuptial settlements and voluntary gifts to wife*, §§ 317-331.—*Wife not liable for husband's fraud of creditors*, §§ 330, 331.

§ 306. Marriage articles are to be distinguished from a marriage settlement which creates trusts *in presenti*. But where, from the circumstances under which the marriage articles were entered into by the parties, or as collected from the face of the instrument itself, it appears to

have been intended that the collateral relatives, in a given event, should take the estate, and a proper limitation to that effect is contained in them, a court of equity will enforce the trust for their benefit. *Neves v. Scott*, §§ 332-335.

§ 307. To make a marriage settlement void as a fraud upon creditors, both parties should concur in or have cognizance of the fraud. Facts bearing upon this point considered. *Magniac v. Thompson*, §§ 336-39. And see *Wilson v. Prewett*, §§ 340-46.

§ 308. In an ante-nuptial settlement the wife becomes the creditor of her husband, and among creditors equally meritorious a debtor may give preference to his wife. Marriage is not only a valuable consideration to support such a settlement, but a consideration of the highest value. *Ibid.*

§ 309. Registration of marriage settlements, under New Jersey statute, considered. Only as conveyances of real estate can such registration be required, and as to unrecorded conveyances they are avoided only as to purchasers and creditors, remaining in full force between the parties. *Ibid.*

§ 310. A marriage settlement should be interpreted by its context so as to give a sensible and consistent meaning to all its parts. Questions of fraud in the contract considered. *Ladd v. Ladd*, §§ 347-51.

§ 311. Where, in a marriage settlement, the object thereof was declared to be the settlement, upon a married woman, of her whole estate, with power to dispose of the same by appointment or devise, a power therein "to appoint to such person," etc., "the interest, rents and profits," extends to and creates a power of appointment of the fee. How this power should be executed. *Ibid.*

§ 312. Marriage cannot be made the means of committing fraud; and bad faith vitiates a settlement notwithstanding the marriage consideration. Badges of fraud considered. *Willson v. Prewett*, §§ 340-46.

§ 313. An ante-nuptial contract binds the parties from the time of its execution. If recorded it binds creditors and purchasers according to the law of the state. *De Lane v. Moore*, §§ 352-55.

§ 314. An ante-nuptial contract valid in the state where executed continues valid when the parties have removed to another state with the property. *Ibid.*

§ 315. Testator had given bond to vest in trustees for his intended wife a sum of money with the interest for her maintenance. The marriage took place and the husband died, making a provision for his wife. *Held*, upon the facts, that the bequest was in lieu of the settlement, but that the wife might elect to take either. *Hunter v. Bryant*, §§ 356-61.

§ 316. Actual maintenance by the husband in general satisfies his promise to pay an annual sum for that purpose, if the parties live together, and no claim for the annual sum is made. *Ibid.*

§ 317. Although, under the common law, the husband is entitled to his wife's personality and her earnings, he may yet permit the same to be invested in real estate for her separate use, if his existing creditors be not thereby prejudiced. *Jackson v. Jackson*, §§ 362-64.

§ 318. Such investments would constitute a voluntary settlement upon her to which the law of resulting trusts does not apply. *Ibid.*

§ 319. Land was purchased by the wife with money which she had previous to the marriage, given to her by her father. The buildings erected thereon were constructed partly with such money and partly with her subsequent earnings. The deed of the land was taken by her in her own name. The building contract was made by her alone with the builder. The policy of insurance was executed to her, and she paid the taxes upon the property. *Held*, that, notwithstanding the common law, which vests the wife's money and her earnings in the husband, fifteen years of acquiescence, during which the wife made improvements from her own means, ought to debar the husband from claiming the land as his upon the divorce of the pair, for his cruel treatment. *Ibid.*

§ 320. A voluntary settlement of property by a husband upon his wife is valid, unless existing claims of creditors be thereby impaired. *Jones v. Clifton*, §§ 365-68.

§ 321. A husband's conveyance to his wife, by way of settlement, may be made directly to her, without the intervention of a trustee, notwithstanding the technical objection of the common law. *Ibid.*

§ 322. The husband's reservation of a power to revoke or appoint to other uses does not impair the validity of such conveyance to his wife by way of settlement; nor does such power pass to his assignee in bankruptcy. *Ibid.*

§ 323. Although purchases of real or personal property made during coverture by the wife of an insolvent debtor are justly regarded with suspicion, they are not to be set aside against a *bona fide* purchaser from her without knowledge of any weakness in her title. *Simms v. Morse*, 369-71.

§ 324. Circumstances amounting to mere suspicion of fraud are not to be deemed notice;

and where an inference of notice is to affect an innocent purchaser, it must appear that the inquiry suggested would, if fairly pursued, have resulted in the discovery of the defect, where the title of the wife does not come through a conveyance from the husband, and is in form perfect, although impeachable by his creditors. *Ibid.*

§ 325. A post-nuptial settlement made by a stranger upon the wife is good and operative, unless dissented from by her husband; and the latter may make a post-nuptial settlement upon his wife for a valuable consideration, or voluntarily without such consideration, if he be not in debt at the time, or the amount be not disproportionate to his means. *Picquet v. Swan*, §§ 372-83.

§ 326. In a post-nuptial settlement the provision for successive trusts and new appointments is unnecessary, for the law silently annexes such rights. *Ibid.*

§ 327. The separate property of a married woman, secured to her, or given to her separate use, will be upheld for her use in equity, and protected from attachment for her husband's debts. *Ibid.*

§ 328. If there is a power of appointment in a post-nuptial settlement, and the wife, living apart from her husband, dies, the furniture, books, silver plate, etc., of her house will be presumed to be hers, so as to pass according to her appointment and disposition. *Ibid.*

§ 329. Should a married woman bequeath an annuity to her husband out of her separate property, under a power of appointment, her executors are not liable to attachment as trustees of her husband until the will or instrument be probated. *Ibid.*

§ 330. No judgment *in personam* can be taken against the wife, or against the representatives of her estate after her death, to recover the value of real estate conveyed to her by the husband in fraud of his creditors. (*Phipps v. Sedgwick*, 95 U. S., 3, followed.) *Trust Co. v. Sedgwick*, §§ 383-84.

§ 331. S., who was special partner in a firm whose nominal assets but slightly exceeded the liabilities, settled property on his wife to the amount of \$100,000. About this time the firm was dissolved, and S. and one of the members of the old firm formed a new copartnership, but without furnishing new capital, and continuing the business as if the old firm existed. Two years later the new firm failed, and was found hopelessly insolvent. The wife, who died before the failure, appeared to have had no guilty knowledge in bringing about the settlement. By her will she gave the income of her estate to her husband for life, with remainder to his children, she having none. Her executor sold part of the property to one who paid therefor partly in cash and partly upon mortgage security. *Held*, that the settlement was invalid for fraud; and that the bankrupt's assignee could avail himself of the mortgage, but not of the balance of the proceeds of the sale. *Ibid.*

[NOTE.—See §§ 385-439.]

NEVES v. SCOTT.

(9 Howard, 196-218. 1849.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is an appeal from a decree of the circuit court of the United States, held in and for the district of the state of Georgia. The bill was filed by the complainants in the court below, to obtain the possession of the undivided half of an estate, embraced in a marriage settlement between John Neves and Catharine Jewell, entered into in contemplation of marriage, and which shortly afterwards took place.

Each of the parties, being the owner and in possession of considerable estates at the time, entered into the following agreement: "Articles of agreement made and entered into this 17th of February, 1810, between John Neves and Catharine Jewell, widow and relict of the late Thomas Jewell (deceased), all of the state and county aforesaid, as follows: Whereas, a marriage is shortly to be had and solemnized between the said John Neves and the said Catharine Jewell, as aforesaid, are as follows, to wit: that all the property, both real and personal, which is now, or may hereafter become, the right of the said John and Catharine, shall remain in common between them, the said husband and wife, during their natural lives; and should the said Catharine become the longest liver, the property to continue hers so long as she shall

live; and at her death the estate to be divided between the heirs of her, said Catharine, and the heirs of the said John, share and share alike, agreeable to the distribution laws of this state made and provided. And, on the other hand, should the said John become the longest liver, the property to remain in the manner and form as above."

The parties after the marriage held and enjoyed their respective estates in common, during their joint lives, and until the death of John in 1828; and after his death the same remained in the possession and enjoyment of Catharine, the survivor, until her decease in 1844; since which time it has been in the possession and under the control of William F. Scott, her second husband, and one of the defendants. The other defendant is the executor under the will of John Neves, the husband. The complainants are the brother and nephew, and only surviving heirs of John Neves, and claim a moiety of the estate, according to the terms of the marriage settlement. And the questions presented in the case are upon the effect to be given to this instrument.

§ 332. *Whether the instrument in question should be regarded as merely marriage articles, and whether collateral relatives can claim the benefit.*

The argument on the part of the defendants is, that the deed is to be regarded in the light of marriage articles creating executory trusts to be carried into execution at some future day by an instrument that would operate to vest the estates according to the stipulations in the articles. And that, as the agreement is founded upon the consideration of marriage, and other considerations moving only between the parties, the complainants, being the collateral relatives of John Neves, do not, according to the rules of equity applicable to this species of contract, come within the reach and influence of the considerations, so as to entitle them to the interposition of a court of chancery to enforce the execution of the trusts. That where the trust is executory, and rests merely in covenant, the court will interpose only in favor of one of the parties to the instrument or the issue, or one claiming through them; and not in favor of remote heirs or strangers, though included within the scope of the provisions of the articles. Fonbl., book 6, ch. 6, § 8; Atherley on Settlements, ch. 5, p. 125; 2 Story's Eq., §§ 986, 987; 2 Kent's Com., 173. Upon this ground, the court below sustained the demurrer to the bill, and denied the prayer of the complainants.

The numerous cases to be found in the books, several of which were referred to in the argument on this subject, are by no means uniform or consistent; and the general rule as stated, and upon which the case below turned, has been made the subject of so many exceptions and qualifications that it can scarcely, at this day, be regarded as authority. *Vernon v. Vernon*, 2 P. Wms., 594; *Edwards v. Countess of Warwick*, id., 171; *Osgood v. Strode*, id., 245; *Ithell v. Beane*, 1 Ves. Sen., 215; S. C., 1 Dick., 132; *Stephens v. Trueman*, 1 Ves. Sen., 73, 74; *Pulvertoft v. Pulvertoft*, 18 Ves., 90; 2 Kent's Com., 172, 173; *Atherley*, 145-148.

The case of *Vernon v. Vernon* is a direct authority in support of the limitation in question; and the other cases to which I have referred are distinguishable only upon very technical and refined reasoning, hardly reconcilable with a common sense administration of justice. The principle is that, in order to bring collateral relatives within the reach and influence of the consideration, there must be something over and above that flowing from the immediate parties to the marriage articles, from which it can be inferred that relatives beyond the issue were intended to be provided for; and that, if the provision

in their behalf had not been agreed to, the superadded consideration would not have been given.

That for anything short of this they will be regarded as volunteers, in whose favor a court of equity will not interpose against the settler or any one claiming under him. But while the rule seems generally to have been adhered to in the form in which it is stated, it has been practically disregarded; as the slightest degree of valuable consideration imaginable is seized hold of to give effect to the limitation. And it need not be made to appear that these slight considerations were intended to support the provision for the distant relatives, it being assumed by the court as a presumption of law.

The lord chancellor in *Stephens v. Trueman* observed: "The old rule was and is now (although of late not so strictly adhered to), that none can come here for a specific performance who do not come under the consideration of the agreement; as that it shall not be for the benefit of collateral branches in marriage articles; but as agreements are entire, and the several branches may have been in view, the court has in later cases laid hold of any circumstances to distinguish them out of it, still preserving the general rule." And in *Edwards v. The Countess of Warwick*, the doctrine is stated still more strongly, where the chancellor observed "that the consideration for the precedent limitations on a marriage settlement has been applied even to the subsequent ones; as where, on a consideration of marriage and portion, land has been settled on the husband for life, and then to the wife for life, remainder to the children, with remainder to a brother, these considerations have extended to the brother; and the reason is, because it may be very well intended that the husband, or his parents, would not have come into the settlement unless all the parties thereto had agreed to the limitation to the brother."

§ 333. *Where marriage articles are, in effect, executed, and in a given event provide for collateral relatives, a court of equity will enforce the trust for their benefit.*

The result of all the cases, I think, will show that if, from the circumstances under which the marriage articles were entered into by the parties, or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives, in a given event, should take the estate, and a proper limitation to that effect is contained in them, a court of equity will enforce the trust for their benefit. They will not be regarded as volunteers outside of the deed, but as coming fairly within the influence of the considerations upon which it is founded; the consideration will extend through all the limitations for the benefit of the remotest persons provided for consistent with law.

The provisions in the deed before us are very peculiar, and different from any that have come under my observation in an examination of the cases; and, of themselves, would probably be sufficient to distinguish it from all of them in which the general rule has been applied. The collateral relatives of the parties to the instrument seem not only to have been within their contemplation at the time, but to have been the direct and special objects of their bounty.

None of the limitations are in favor of the issue of the marriage, *eo nomine*, usually found in these instruments; but are in favor of the several heirs of each of the parties, as a class, the estate to be divided equally between the two. The settlement seems to negative the expectation of issue, and seeks at once to provide for the collateral relatives; as the peculiar phraseology would

hardly have occurred to the most inexperienced draftsman, if he had had in his mind at the time the issue of the marriage. It is true, the children or grandchildren coming within the description of the limitation to the heirs of each of the parties, being the heirs of both, would, if they survived the parents, take the estate to the exclusion of the collateral branches; but this would seem to be an accident, rather than a result to be derived from the frame of the limitation, as that looks directly to a provision for the separate and several heirs of each of the parties, and to an equal division of the estate between them.

Each of the parties appears to have been in the possession of considerable estates (which was the largest is not stated); and on the event of the marriage, both were to become common property during their joint lives, and the life of the survivor; and, instead of providing for the return of the separate estate of each, on the termination of the lives, into the channel from which it was diverted by the marriage contract, they agree that the joint estate shall be divided equally, and that each moiety shall take that direction and be distributed in their respective families.

To refuse to carry into execution this arrangement, therefore, would be in effect to overthrow the settlement, and defeat not only the manifest intent, but the leading design of the parties entering into it. None of the cases relied on, I think, go this length. But, without pursuing this branch of the case further, or placing our decision upon it, there is another ground, unembarrassed by conflicting authorities or refined distinctions, which the court are of the opinion is decisive of the questions involved in favor of the complainants. And that is, that the deed in question is a marriage settlement, complete in itself,—an executed trust, which requires only to be obeyed and fulfilled by those standing in the relation of trustees, for the benefit of the *cestui que trusts*, according to the provisions of the settlement.

The defendants are not called upon to make a settlement of the estate, under the direction of the court, from imperfect and incomplete marriage articles, and which might or might not be subject to the objections stated. The settlement has been made by the parties themselves; and the only question is, whether the defendants shall be compelled to carry it into execution.

§ 334. *Distinction between executed and executory trusts.*

The distinction between trusts executed and executory is this: a trust executed is where the party has given complete directions for settling his estate, with perfect limitations; an executory trust, where the directions are incomplete, and are rather minutes or instructions for the settlement. 1 Mad. Ch., 558; 2 Story's Eq., § 983. The former, as observed by Lord Eldon, in one sense of the word, is a trust executory; that is, he observes, if A. B. is a trustee for C. D., or for C. D. and others, that, in this sense, is executory, that C. D., or C. D. and the other persons, may call upon A. B. to make a conveyance and execute the trust; but these are cases where the testator has clearly decided what the trust is to be; and as equity follows the law where the testator has left nothing to be done, but has himself expressed it, there the effect must be the same whether the estate is equitable or legal. *Jervoise v. The Duke of Northumberland*, 1 Jac. & Walk., 559. The remarks were made for a different purpose than the one in view here; but they afford a clear illustration of the distinction stated.

Now, the only plausible ground for contending that this instrument imports but mere articles, as contradistinguished from a marriage settlement, is, that

in the caption it begins, "Articles of agreement," etc.; but it is to be observed that the deed is drawn up somewhat unskilfully, and without much regard to form; and that the draftsman had not probably in his mind, if even he was aware of, the technical or legal distinction between the two instruments; and besides, and what is more material to the purpose, we must look to the body of the instrument, its provisions and tenor, and to the intent of the parties, as collected from the whole, in order to determine its character and effect.

Courts will endeavor, as much as possible, to give effect to marriage agreements according to the understanding of the parties; and where they evidently considered the instrument in the light of a final and complete settlement, not contemplating any future act, it will be so regarded; and in order to effectuate their intent, one part of the instrument even will be taken as a complete settlement of the estate comprised in it, and another part as mere articles.

In the case before us, every portion of the estate is definitely settled, both in respect to the amount of the interest, and the particular persons who are to take; the limitations leave no part undisposed of; estates for life, and in remainder in the property, are limited with all the formality required to enable a court of equity to carry the trust into execution, according to the intent of the settlers. There is nothing in the instrument contemplating any further act to be done by them. The practical construction, also, accords with that derived from their language. The estate was possessed and enjoyed under it, by both or one of them, from 1810 to 1844, a period of thirty-four years.

§ 335. *A trustee is not necessary to give effect to a trust.*

If a third person had been interposed as trustee of the estates, with the limitation as found in the instrument, no one could, for a moment, have doubted but that the settlement would have been final and complete; and yet it has long been settled that equal effect will be given to it in equity, when made only between the parties themselves; each one will be regarded, so far as may be necessary to effectuate their intent, as holding their several estates as trustees for the uses of the settlement. 2 Story's Equity, § 1380; Fonbl., book 1, ch. 2, § 6, note n; 2 Kent's Com., 162, 163; 9 Ves., 375, 383; 3 Johns. Ch., 540. There can be no objection to the execution of the trust on this ground.

It appears from the bill that portions of the estate in the possession of the defendants were acquired by the parties to the settlement, subsequent to its execution, and it is supposed that this consideration is material in determining its character; and that if it should be regarded as a settlement, and not mere articles, these subsequent acquisitions would not be bound by it. But this is a mistake. The instrument provides for subsequently acquired property by either of the parties, as well as the present, and in such cases there is no doubt but that it follows the limitations of the settlement, the same as the property then in possession. 10 Ves., 574, 579; 9 id., 95, 96; 7 id., 294; 6 id., 403, note, Boston ed.

Looking, then, at the instrument as complete in its directions and limitations in the settlement of the estate, and as presenting the case of an executed trust, the difficulty set up against the complainants when claiming under marriage articles disappears; for, being the beneficial owners, and vested with the equitable title, a court of equity will interpose, and compel the trustee, or any one standing in that relation to the estate, to vest them with the legal

title. We are of opinion, therefore, that the court below erred in giving judgment in favor of the defendants on the demurrer to the bill, and that the decree should be reversed. (*a*)

MAGNIAC *v.* THOMPSON.

(7 Peters, 343-396. 1833.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.— This is a writ of error to the circuit court for the district of Pennsylvania. The original action was a feigned issue between the plaintiffs, who are creditors, and the defendant, to try the question whether he is able to pay the debt due to them; and this depends upon the validity of certain articles of settlement, made in contemplation of a marriage between the defendant and Miss Annis Stockton, daughter of the late Richard Stockton, Esq., stated in the case. The verdict in the court below was for the defendant, and judgment having been rendered thereon accordingly, the present writ of error is brought to revise that judgment, upon a bill of exceptions taken to the charge of the court at the trial.

The whole charge of the court is spread upon the record (a practice which this court have uniformly discountenanced, and which, we trust, a rule made at the last term will effectually suppress); and the question now is, whether that charge contains any erroneous statement of the law; for as to the comments of the court upon the evidence, it is almost unnecessary to say, after what was said by this court in *Carver v. Jackson*, 4 Pet., 80, 81, that we have nothing to do with them. In examining the charge for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge. In short, we are to construe the whole as it must have been understood, both by the court and jury, at the time when it was delivered.

The material facts are as follows: The plaintiffs and the defendant were resident merchants in China; and the defendant left it in March, 1825, to visit America. In the summer of that year he paid his addresses to Miss Stockton, then resident with her father in New Jersey, by whom his addresses were accepted; and in contemplation of marriage on the 19th of December, of the same year, the articles of marriage settlement referred to were executed. They purport to be articles of agreement and covenant between the defendant of the first part, Miss Annis Stockton of the second part, and Richard Stockton, father and trustee of Miss Stockton, of the third part. By these articles, after reciting the intended marriage, and that Richard Stockton, the father, had promised to give a certain lot of land (described in the articles) to his daughter, upon which the defendant, Thompson, had begun to build a house, it is stated that R. Stockton covenants, in consideration of the said marriage, and his love and affection for his daughter, that from the time of the marriage he will stand seized of the lot and premises in trust to permit the defendant and Annis, his wife, to live in and occupy the same; and if they do not think proper so to do, then to let out the premises on lease, and receive the rents and

(a) See this marriage agreement further explained in *Neves v. Scott*, 18 How., 268.

profits and pay over the same to the said Annis during the joint lives of herself and her husband (the defendant); if the defendant should survive his said wife and have issue by her, then in trust to permit him during his life to inhabit and occupy the premises, if he should elect so to do, and to pay over the rents and profits to him for the support of himself and his family, without his (the defendant's) being accountable therefor; and after his death, in trust for the child or children of the marriage in equal shares as tenants in common; and if no children, then, upon the death of either the husband or the wife, to convey the premises to the survivor in fee-simple. By the same instrument, the defendant covenants that if the marriage should take effect, and in consideration thereof, he will, with all convenient speed, build and furnish the house in a suitable manner, as he shall judge fit and proper, and that the erections, improvements and furniture shall be subject to and included in the trusts. And further, that he will, in the space of a year from the marriage, place out at good security, in stock or otherwise, the sum of \$40,000, and hand over and assign the evidences thereof to the trustee, who shall hold the same in trust to receive the interest, profits and dividends thereof for the wife, during the joint lives of herself and her husband. And if she should die before her husband, and there should be issue of the marriage, then in trust to receive the interest, profits and dividends, and pay the same to the husband during his life, for the support and maintenance of himself and children, without any account, and after his death, in trust for the children of the marriage. A similar provision is made in case of the survivorship of the wife; and if no children, then the trustee is to assign and deliver the securities and moneys remaining due to the survivor to his or her own use.

Such are the most material clauses of the marriage articles. Before the execution of them the defendant made out a written statement of his pecuniary circumstances, in which he states that he owes no personal debts except to a small amount in the common course of business; that he is surety for his father in a bottomry bond to Messrs. Schott and Lippincott, in the penal sum of \$200,000, upon which there was a pledge of goods, supposed to be sufficient to discharge the bond; and if any loss should accrue, it could not be more than \$20,000, and that he considered himself worth that amount, if not more, in addition to the sum proposed to be settled.

From the testimony in the case, which is stated in the charge, it appears that the marriage was consummated; that the defendant built the house on the lot mentioned in the articles at an expense of \$13,000, and furnished it at the expense of \$5,000, but invested no part of the \$40,000 during the life of the trustee. It also appears that at the time of executing the articles he was worth about eighty or ninety thousand dollars in money and personal property; that his agent in China, in November and December, 1825, borrowed of the plaintiffs \$63,000 on the pledge and security of property of the invoice value of \$86,000 and upwards, on the credit of the defendant, but entirely for the use of the defendant's father, in order to complete the cargoes of his ships, then at Canton short of funds. The property arrived at a losing market, and the debt now due to the plaintiffs by the defendant grew out of their transactions, his father having failed on the 19th of November, 1825; but the existence of the loan contracted with the plaintiffs was not known to the defendant (though fully authorized to be made if necessary) until the spring of 1826.

The marriage articles were never recorded in New Jersey, where the land lies, until May, 1830, after the death of the trustee. In September, 1829, shortly before the plaintiffs obtained a judgment for either debt against the defendant, the defendant delivered over to Captain Robert Stockton, the son of the trustee, who succeeded him in the trust, securities to the amount of \$9,500 on account of the sum to be invested pursuant to the marriage articles.

Such are the material facts which appeared at the trial, and the question was whether, under all the circumstances, the marriage articles were void as a fraud upon creditors. With reference to this point, the learned judge who delivered the charge to the jury made, among others, the following remarks: "To taint a transaction with fraud both parties must concur in the illegal design. It is not enough to prove fraud in the debtor. He may lawfully sell his property, with the direct intention of defrauding his creditors, or prefer one creditor to another. But unless the purchaser or preferred creditor receives the property with the same fraudulent design, the contract is valid against other creditors or purchasers who may be injured by the transaction." "Before you can pronounce this marriage agreement void and inoperative on the ground of actual fraud, you must be satisfied not only that the defendant made it with design to defraud his creditors, but also that Mrs. Thompson, and her father and trustee, Mr. Richard Stockton, participated and concurred in the fraud intended. If they were innocent of the combination, it would be harsh and cruel in the extreme to visit on her the serious consequences of her intended husband's acts, and as inconsistent with law as justice." "The deeds, gifts, grants or other contracts which the law avoids are those made with intent to defraud, hinder, delay or injure creditors; and in order to avoid them, both the party giving and the party receiving must participate in the fraud." "The words of the law (the statute of 13 Elizabeth, c. 5) require that both parties must concur in the fraud in order to bring the same within the provisions."

§ 336. *To make a marriage settlement void, as a fraud upon creditors, both parties should concur in or have cognizance of the fraud.*

Nothing can be clearer, both upon principle and authority, than the doctrine that to make an ante-nuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the settler alone intend a fraud, and the other party have no notice of it, but is innocent of it, she is not, and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value; and from motives of the soundest policy is upheld with a steady resolution. The husband and wife, parties to such a contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration; and so that it is *bona fide*, and without notice of fraud brought home to both sides, it becomes unimpeachable by creditors. Fraud may be imputable to the parties either by direct co-operation in the original design at the time of its concoction, or by constructive co-operation from notice of it, and carrying the design, after such notice, into execution.

The argument at the bar admits these principles to be incontrovertible. But it is supposed by the counsel for the plaintiffs in error that the charge contains a different and broader doctrine; that it requires active co-operation, preconcert and participation in the original design of fraud, and that notice of

it is not sufficient to avoid the settlement, although all the parties, after such notice, proceed to execute it.

It appears to us that this is an entirely erroneous view of the scope and reasoning of the charge, even in the passages above cited. But taking them in connection with other passages in the same charge, it is beyond doubt that no such distinction was in the mind of the court, or was in fact uttered to the jury. The language of the charge has reference to the actual posture of the case before the court, and not to any other possible state of facts. The case was not of a settlement already made and executed by the settler alone, with a fraudulent intent, to which settlement the wife or her trustee were not contemplated to be executing parties, and which was, after notice of the intent, accepted by them; in which the effect of notice might have been the very hinge of the cause. But the case was of marriage articles about to be executed by all the parties upon negotiations then had between them for that purpose; and of course, if there was a fraudulent design known to all the parties at the time, the very execution of the articles made them all equally participators and parties to the fraud. It necessarily involved combination, and participation, and preconcert. It was to this posture of facts that the reasoning of the charge was addressed, and it met and stated the law truly as applicable to them. Notice under such circumstances necessarily included participation in the fraud. It was not possible that the wife and her trustee, with notice of an intended fraud on the part of her husband, could execute the instrument without being, in the sense of the law, *participes delicti*.

But the charge does, in various other passages, distinctly point out to the jury the very doctrine which the plaintiffs in error assume as the basis of their argument, and for which they contend. Thus, in commenting upon the different classes of conveyances to which the statute of 13 Eliz. is applicable, it is observed that all conveyances are valid and excepted, which are "for a valuable consideration, in good faith, without notice by the person receiving the conveyance of any fraud, covin or collusion by the grantor to defraud his creditors." Again, "the consideration being valuable, if the contract, whether executed or executory, is made in good faith, with one having no notice or knowledge of any fraud, covin or collusion to defraud creditors, performance may be enforced or voluntarily made, and the contract carried into execution at any time, either in the whole or in part, as is in the power of the party." Again, "it is the opinion of the court that the evidence in this case brings the marriage contract within the sixth section of the law (the act of 13 Eliz.), excepting it from the operation of the first section, unless you shall find that it was made, not *bona fide*, or with notice or knowledge of a fraud in John R. Thompson in entering into it, brought home to his intended wife, and that Thompson actually entered into it with such fraudulent, covinous and collusive intention." And, without dwelling on other passages equally expressive, it is added in the very close of the charge, "we conclude, then, with instructing you, that a settlement made before marriage makes the intended wife a purchaser for a valuable consideration; if agreed to be made, she is a creditor, and protected in the enjoyment of the thing settled, and entitled to the means of enforcing what is executory, if the transaction was *bona fide* and without notice of fraud." That these directions are correct in point of law cannot admit of doubt; and that they cover the whole ground asserted in the argument for the plaintiffs seems equally undeniable. We may then dismiss any further commentary on this part of the case.

§ 337. *Question of expenditure considered; whether so great as to be a fraud upon creditors.*

The next objection is to the charge of the court in regard to the furniture. The court were requested to charge the jury that the expenditure of \$5,000 in furnishing the house was, *per se*, fraudulent. The court refused so to do, stating "that furniture is part of the marriage contract, to be provided by Thompson, in a suitable manner, as he should think fit. He had a discretion which he might exercise in a reasonable manner, according to their station and associations in life, proportioned to the kind of house and extent of income; the trustee or wife could not, in law or equity, compel Thompson to furnish it extravagantly, or at useless and wanton expense; and if he should do it voluntarily, it would not be within the true spirit and meaning of the marriage articles, and might be deemed a legal fraud on creditors as to the excess. But before we can say that it is a fraud in law to expend \$5,000 in furnishing a house costing \$13,000, and the establishment to be supported by the income of an investment of \$40,000 in productive funds, we must be satisfied that it is, at the first blush, an extravagant and unwarranted expenditure under all the circumstances in evidence, and to an extent indicating some fraudulent or other motive unconnected with the fair execution of the contract, of which we are not satisfied.

It is difficult to perceive any error in this direction; and it was going quite as far in favor of the plaintiffs in error as the law would warrant; for the change of circumstances of the defendant made no difference in his obligations to perform the stipulations of the marriage articles. The court might well have refused to give the instruction without any explanation, for it was asking them to decide, as matter of law, what was clearly matter of fact. The argument at the bar has indeed insisted that the court misunderstood the object and request of the counsel; but there is no evidence of that on the record, and certainly it is not to be presumed.

§ 338. *In a marriage settlement wife becomes creditor of husband, and among creditors equally meritorious a debtor may give preference to his wife.*

The next objection is to the charge of the court respecting the delivery of the notes to Captain Robert Stockton, in September, 1829. The court were requested to charge the jury that the delivery of these notes to Captain Stockton was a fraud. The court directed the jury that "if it was done in order to comply, in part, with the agreement, it was not so. If it was colorable, made with the intention of covering and concealing so much under pretense of the marriage articles, for Thompson's use, and so received by the trustee, it was legally fraudulent as to creditors; but if delivered with such intention, and not so accepted, then Captain Stockton might not only fairly apply it to the trust fund, but was bound so to do. Though it may have been done on the eve of the judgment confessed in New Jersey, that would make no difference; it being to carry into effect the agreement of December, 1825."

We cannot perceive any error in this part of the charge. The wife became a purchaser and creditor of her husband, in virtue of the marriage articles; and if the delivery of the notes was made in part performance of these articles, *bona fide*, and without fraud, it was a discharge of a moral as well as of a legal duty. Among creditors equally meritorious, a debtor may conscientiously prefer one to another; and it can make no difference that the preferred creditor is his wife.

§ 339. *Necessity of registration of marriage articles under New Jersey laws.*

The remaining objection is, that the marriage articles are inoperative and void, not having been recorded within the time prescribed by the laws of New Jersey for the registration of conveyances. To this objection several answers may be given, each of which is equally conclusive against the plaintiffs in error. In the first place, marriage articles or settlements, as such, are not required by the laws of New Jersey to be recorded at all, but only conveyances of real estate; and as to conveyances of real estate, the omission to record them avoids them only as to purchasers and creditors, leaving them in full force between the parties. This is the express provision of the statute of New Jersey of 1820 (see the act of 1820; Laws of New Jersey, ed. 1821, p. 747), so that, notwithstanding the non-registration, the articles were good between the parties. In the next place, as to the personal estate, covenanted on the part of the defendant to be settled on his wife, whether furniture or money, it is clear that the non-registration of the articles could produce no effect whatever. If the conveyance was free of fraud, it was as to the personal estate completely valid, even against creditors. In the next place, as to the real estate covered by the articles, whether these articles are treated as an actual conveyance, or as an executory contract, it is clear that, except as to the creditors of the grantor, Mr. Stockton, they were completely valid and operative. Viewed as a conveyance, or as a contract for a conveyance, the husband could not, consistently with the avowed trusts, take any legal estate or executed use in the real estate. The grantor necessarily remained the legal owner, in order to effectuate the trusts of the settlement; and the husband could entitle himself to the benefit of the trusts provided in his favor, only in the events and upon the contingencies which are therein stated. He had no equitable interest therein capable of a present appropriation by his creditors. In every view of the circumstances, it is therefore clear that the non-registration of the articles does not touch the plaintiff's rights; and the court were correct in their instruction to the jury, "that the marriage contract is not void for want of being recorded in time."

Upon the whole, it is the unanimous opinion of the court that the judgment of the circuit court ought to be affirmed with costs.

Judgment accordingly. (a)

WILSON v. PREWETT.

(Circuit Court for Alabama: 3 Woods, 631-642. 1878.)

STATEMENT OF FACTS.—The marriage of Richard Prewett in 1866 was preceded by a marriage settlement, in which he settled upon his prospective wife all of his property, leaving unpaid and unprovided for debts to the amount of \$70,000. This bill was filed to have the ante-nuptial settlement set aside and declared fraudulent and void. Further facts appear in the opinion of the court.

§ 340. *An ante-nuptial settlement, to be a fraud on creditors, should have the concurrence of both husband and wife.*

Opinion by Woods, J.

The attack on the marriage settlement is made by the assignee in bankruptcy of Richard Prewett, representing his creditors, and the charge is that the settlement was made by Richard Prewett, and accepted by Josephine Prewett,

(a) Affirming *Magniac v. Thompson*, * 1 Bald., 344.

with the purpose to hinder, delay and defraud the creditors of the former, and is, therefore, null and void. The bill prays that the deed may be so declared, and the property described therein turned over to the assignee, and by him administered as assets of the bankrupt estate. The principles of law which apply to a case like this are well settled.

"Nothing can be clearer, both upon principle and authority, than the doctrine that, to make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of, the intended fraud. If the settler alone intend a fraud, and the other party have no notice of it, but is innocent of it, she is not and cannot be affected by it. Marriage, in contemplation of law, is not only a valuable consideration to support a settlement, but is a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution. The husband and wife, parties to such a contract, are, therefore, deemed, in the highest sense, purchasers for a valuable consideration, and so that if it is *bona fide* and without notice of fraud, brought home to both sides, it becomes unimpeachable by creditors. Fraud may be imputable to the parties, either by direct co-operation in the original design at the time of its concoction, or by constructive co-operation from notice of it, and by carrying the design, after such notice, into execution." *Magniac v. Thompson*, 7 Pet., 348 (§§ 336-39, *supra*). See, also, 1 Bishop on Married Women, sec. 775; Co. Litt., 9 (6); Schouler's Dom. Rel., 263; *Ford v. Stuart*, 15 Beav., 493; *Nairn v. Prowse*, 6 Ves. Jr., 752; *Peachey, Mar. Settl.*, 56; *Armfield v. Armfield*, 1 Freeman's Ch., 311; *Sterry v. Arden*, 1 Johns. Ch., 261; *Sterry v. Verplank*, 12 Johns., 536; *Johnson v. Dillard*, 1 Bay, 232, 234; *Huston v. Cantrill*, 11 Leigh, 136; *Tunno v. Trezevant*, 2 Dessaus., 264; *Whelan v. Whelan*, 3 Cow., 537.

§ 341. — *but if a settlement is made in bad faith, the marriage consideration on which it is founded will not save it.*

In *Cadogan v. Kennett*, 2 Cowp., 432, which was an action of trover brought by the plaintiff's trustees, under the marriage settlement of Lord Montford, against the defendant, who was a judgment creditor of Lord Montford, and the sheriff's officers, to recover certain goods taken by them in execution, Lord Mansfield said: "If the transaction be not *bona fide*, the circumstance of its being done for a valuable consideration will not alone take it out of the statute. I have known several cases where persons have given a full and fair price for goods, and where the possession was actually changed. Yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent and void." . . . "The question in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick or contrivance to defeat creditors."

"A man who is indebted may, on his marriage, make a settlement of his property, provided the settlement is made honestly and in good faith, and the wife's knowledge of his indebtedness will not alone render it void. It is, however, clearly established that marriage cannot be made the means of committing fraud. If there is intent to delay, hinder or defraud creditors, and to make the celebration of a marriage part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support the settlement." Bump on Fraudulent Conveyances, 308; citing *Bulmer v. Hunter*, L. R., 8 Eq., 46; *Ex parte McBurnie*, 1 De G., M. & G., 441; *Betts v. Union Bank, Harr. & G.*, 175; *Campion v. Cotton*, 17 Ves. Jr., 264; *Richardson v. Horton*, 7 Beav., 112; *Colombine v. Penhall*, 1 Sm. & G., 228.

§ 342. *Badges of fraud in marriage settlements.*

Notice of the fraud may be inferred from the facts and circumstances of the settlement. *Colombine v. Penhall*, and *Bulmer v. Hunter*, *supra*. If the amount of property settled is extravagant, or grossly out of proportion to the station and circumstances of the husband, this, of itself, is sufficient notice of fraud. *Ex parte McBurnie*, *supra*; *Croft v. Arthur*, 3 Dessaus., 223.

In an able opinion, in the case of *Simpson v. Graves*, reported in *Riley's Equity Cases*, 232, Justice Nott, of South Carolina, says: "There is no case that I have seen, where a man has been permitted to make an intended wife a mere stock to graft his property upon, in order to place it beyond the reach of his creditors. A marriage settlement must be construed like every other instrument. The question may always be raised, whether it was made with good faith, or intended as an instrument of fraud. Even though marriage may be a part of the consideration, fraud may be mingled with it, and that may be as well inferred from internal evidence as from circumstances *aliunde*."

"Marriage is put on the footing of a pecuniary consideration. And it is said, if a person sell his property for a full consideration and squander the money, his creditors have no redress. From which it is inferred that marriage will afford the same protection. But, in the case of a *bona fide* sale, the seller has parted with his property, the purchaser has parted with his money, and the law will presume that the object was the payment of his debts. But the purchaser is not answerable for the misapplication of the money. It is not so with a marriage settlement. The seller does not, in fact, part with his property. It is still intended for his own enjoyment. Neither does he receive in return anything that will satisfy his creditors. His wife will not be received in payment of his debts. It is not to be understood that because marriage is equivalent to a pecuniary consideration, it is to be considered in the nature of an actual purchase. A settlement is not intended as the price of the wife, but as a provision for a family. It must, therefore, be reasonable, and with a due regard to the rights of others. A creditor has an equitable claim to the property of the debtor."

§ 343. — *these rules applied. Proof of other fraudulent transactions. Evidence discussed.*

Applying these rules of law to the facts of this case, it is to be determined whether the purpose of Richard Prewett, in making the conveyance to the woman whom he proposed to marry, was to hinder, delay or defraud his creditors, and, if it were, whether Josephine Prewett had notice of such purpose before the marriage.

As to the first question, the evidence leaves no doubt in my mind touching the fraudulent intent of Richard Prewett. To ascertain the intent of the settler we are authorized to consider fraudulent transfers to other persons at or about the time of the transfer assailed. *Bump on Fraudulent Conveyances*, 545, and numerous authorities there cited.

The evidence shows that Prewett had been insolvent ever since the close of the late war; that he was largely insolvent on November 20, 1865, when he made a conveyance to his son-in-law, Bates, of four thousand four hundred acres of land. The consideration named in this deed was \$25,982 in money. Prewett testifies that this was not the real consideration, but that it was the discharge of his debt to Bates, and the payment by Bates of the residue in money. He further says, that at the date of this deed no formal account was stated between him and Bates, but the debt was supposed to be \$17,000 or

\$18,000; but that afterwards, in July, 1866, the account was stated, which showed that there was due from Prewett to Bates the sum of \$18,560.80. The account is in evidence, and it bears upon its face the ear-marks of a trumped-up account. There is not a word of evidence to show that any contract had ever been made by Bates for his own services, or for the hire of his slave, or for the sale of his horse; that any note had ever been given, or any account kept. In fact, Prewett says the account was never stated till eight months after the date of the deed of November 20, 1865. It is a remarkable fact, too, that for a period of eleven years this account should be allowed to run, without a single credit or payment. That such an account could be *bona fide* seems incredible. And yet, upon such an account, at that time uncertain in amount, and without the payment of a cent of money, and without taking from him any evidence of debt, Prewett conveys lands to Bates which he estimated to be worth \$26,000. If this were the deed assailed, no court would have any hesitation in pronouncing it fraudulent. We find, then, that in November, 1865, Prewett, being hopelessly insolvent, is attempting to cover up a large part of his property by a fraudulent deed to his son-in-law.

For some reason the device was abandoned and the deed returned to Prewett, but there was no reconveyance of the land to him, and in the following April Prewett executed the marriage settlement. He owed his creditors \$90,000. His available means amounted to little over \$50,000. Of these means he devoted \$13,000 to the payment of two favored creditors; he retained lands worth about \$7,000, which must have been under the cloud of the deed of November, 1865, which was never canceled, and which he afterwards conveyed to his son-in-law, Bates, in payment of the account heretofore referred to, and he conveyed to his intended wife all the residue of his property, worth, according to the agreed facts, \$32,776, leaving about \$70,000 of debts unprovided for.

The mere statement of these facts reveals the purpose of Prewett. He commenced his attempts to defeat his creditors by a fraudulent deed, in November, and he closes by a deed by which he, in effect, secures to himself the enjoyment of more than three-fifths of his property by a conveyance to his intended wife, and leaves creditors to the amount of \$70,000 entirely unprovided for. The effect of this deed was to hinder, delay and defraud his creditors, who were not mentioned in the marriage settlement, for it conveyed all the property which he had not before conveyed, and left such creditors nothing. Prewett must be held to know what he was about, and to intend the natural consequences of his act. The pretense that he was insolvent in April, 1866, but did not know it, is absurd. He owed \$90,000, which was bearing interest, and he had but \$50,000 of property to pay it with. The disposition of \$33,000 of this property, all that he had not covered by a former deed, in such a way as to place it beyond the reach of his creditors, while, at the same time, he received no pecuniary equivalent which he could apply to his debts, shows clearly his purpose to defraud his creditors.

Prewett was, at the date of the settlement, embarrassed and largely insolvent. The property settled on his proposed wife was out of all reasonable proportion to his means, even if he had owed no debts. The property settled was equitably the property of his creditors. The deed of settlement conveyed substantially all his property not covered by a previous conveyance which was still in force, and it left creditors to the amount of \$70,000 entirely unprovided for. When, in December, 1868, Prewett filed his schedule in bankruptcy, he reported his wearing apparel, valued at \$50, as his only assets. We

find, then, that the fraud upon the creditors, designed and consummated by Prewett, was gross and palpable.

§ 344. *What cognizance of the fraud by the wife avoids a settlement as against her.*

But fraud brought home to the settler is not of itself sufficient to avoid the settlement. The grantee must participate in the fraud, or at least have cognizance of it. It is therefore to be inquired whether Josephine Prewett had, before her marriage with Richard Prewett, notice of the fraud which Prewett contemplated, and which he carried into execution by means of the marriage settlement. We know, from her own answer, that, before the execution of the marriage settlement, she was advised that Prewett was indebted, and that he was embarrassed, and it was, as she says, on account of his indebtedness and embarrassment, that she demanded a marriage settlement before she would consent to marry him.

Why did she make this demand? Clearly because she feared that the creditors of Prewett might sweep away his property and leave her destitute. With this knowledge Prewett presents to her a conveyance, which transfers to her property worth \$32,776. Could she, *bona fide*, knowing that Prewett was indebted and embarrassed, accept a conveyance for so large a sum? Could she shut her eyes and say she did not know the extent of his debts, did not know of his fraudulent purpose, and, therefore, she received the deed in good faith?

Actual knowledge of the fraudulent intent is not necessary. A knowledge of facts sufficient to excite the suspicions of a prudent man or woman, and to put him or her on inquiry, amounts to notice, and is equivalent to actual knowledge in contemplation of law. *Atwood v. Impson*, 5 C. E. Green, 150; *Tantum v. Green*, 6 C. E. Green, 364; *Jackson v. Mather*, 7 Cow., 301; *Smith v. Henry*, 2 Bailey, 118; *Mills v. Howeth*, 19 Tex., 257.

It has even been held that the means of knowledge, by the use of ordinary diligence, amounts to notice. *Farmers' Bank v. Douglass*, 11 Smedes & M., 469. But in this case it is not necessary to go so far. The indebtedness and pecuniary embarrassment of Prewett, and the large estate conveyed by the deed of settlement, put Josephine Prewett on inquiry, and she is chargeable with knowledge of every fact which she could have learned on inquiry. She might have learned all that the evidence in this case discloses about the amount of Prewett's debts and property, and such knowledge would have made clear Prewett's fraudulent purpose. She is, therefore, chargeable with notice of the fraud, and her acceptance of the deed of settlement, after such notice, makes her a party to the fraud, and renders the marriage settlement null and void.

§ 345. *A deed inuring to the benefit of two persons, one only being cognizant of the fraud, if fraudulent at all is void as to both.*

The creditors of Prewett, whose *bona fide* debts were provided for by the marriage settlement, can take no benefit from the fraudulent instrument. When a deed in favor of two persons is obtained by the fraud of one, although without the privity of the other, the deed will be void as to both. *Whelan v. Whelan*, 3 Cow., 537; *Hunt v. Bass*, 2 Dev. Eq. (N. C.), 292; *Huguenin v. Baseley*, 14 Ves. Jr., 273; *Townsend v. Harwell*, 18 Ala., 301. Although they had no notice or knowledge of the fraud contemplated by Prewett, yet the fact that the grantee, under whom their rights are claimed, not only had notice of the fraud, but was a beneficiary under the fraudulent deed, avoids the instrument as to the beneficiary as well as to the grantee.

§ 346. *Conclusion: that the marriage settlement must be declared void.*

The result of these views is, that the marriage settlement made by Richard upon Josephine Prewett must be declared void for all purposes, and the property conveyed thereby turned over to the assignee in bankruptcy for administration. (a)

LADD v. LADD.

(8 Howard, 10-40. 1849.)

APPEAL from the Circuit Court for the District of Columbia.

Bill in equity to set aside an appointment made by complainant under a power reserved in a marriage settlement.

Opinion by MR. JUSTICE DANIEL.

The important legal questions arising upon this record, and on which the decision of the cause must depend, appear to be these: 1. The nature and extent of the estate embraced within the power reserved to the *feme* by the marriage settlement, namely, whether that power comprised as well real as personal estate, or was limited to interest, rents and profits merely, and by name. 2. The mode of appointment indicated by the marriage contract; and whether this mode has been shown to have been either strictly or substantially and fairly complied with in the requisites of signing, sealing and attestation.

§ 347. *Undue influence by husband over wife; what is not sufficient to constitute it.*

Before proceeding to a particular examination of the questions above stated, it may be proper to premise some observations with respect to the charges in the bill; and first, of undue marital influence; and secondly, of fraud as means employed in accomplishing the wrongs to which the complainant alleges she has been subjected, and against which she has sought relief. With regard to the first of these alleged means, it must be remarked that no certain or specific mode or act, neither coercion, allurement, nor wilful misrepresentation or falsehood, is charged, by which the free will, the judgment or the inclination of the complainant has been restrained or misled. Every *feme covert* is presumed, under a settlement like the one in the present case, to be, to some extent, a free agent; and she must, or ought to be, presumed to entertain dispositions of kindness towards her husband. But if, in the indulgence of such dispositions, she should make an unlucky or unprofitable appointment, it would be carrying the principle of protection to an extreme destructive of every conception of free agency, to determine that these untoward results were in themselves proofs of undue marital influence.

(a) This case was taken by appeal to the supreme court, where the decree was reversed, with directions to dismiss the bill. It seems that the supreme court concur in the statement by the lower court of the law applicable to the case, and the reversal is put upon the ground that the evidence did not warrant the inference that the wife had notice of the intended fraud of the husband. The law is stated thus: "Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution." "When a deed is executed for a valuable and adequate consideration, without knowledge by the grantee of any fraudulent intent of the grantor, it will be upheld, however fraudulent his purpose. To vitiate the transfer in such case, the grantee also must be chargeable with knowledge of the intention of the grantor." "There is an entire absence of elements which would vitiate even an ordinary transaction of sale where, if set aside, the parties may be placed in their former positions. And an ante-nuptial settlement, though made with a fraudulent design by the settler, should not be annulled without the clearest proof of the wife's participation in the intended fraud, for upon its annulment there can follow no dissolution of the marriage, which was the consideration of the settlement." *Prewitt v. Wilson*,* 18 Otto, 22.

§ 348. *The positive denial of fraud in an answer in equity, and the absence of proof thereof, should alone be taken as a complete refutation of the charge of fraud.*

The husband does not answer the bill in this case; and there is no direct evidence introduced to sustain this charge as to him; but some of the facts in the testimony go very far to contradict this allegation—as, for instance, the conduct of the *feme*, manifested and repeated long after the separation from her husband had at any rate exempted her from any influence his presence and immediate agency might have been supposed to exert. This same conduct of the *feme*, her positive co-operation in the arrangements for the sale of the property, and her acquiescence in that sale until after the title had been made to the purchaser, furnish such presumption of the absence of fraud in the transactions complained of, which, if it is not absolutely conclusive, certainly calls for contravening evidence of a direct and powerful character,—evidence of force sufficient to overthrow and set aside the complainant's own acts and declarations. But, independently of the facts and circumstances just adverted to, the positive denial of fraud in every answer in the cause, and the absence of any proof to sustain it, should alone be taken as a complete refutation of the charge.

§ 349. *A marriage settlement should be interpreted by its context, so as to give a sensible and consistent meaning to all its parts.*

We will now particularly consider the nature and extent of the estate reserved to the complainant by the marriage settlement, and which was embraced within her power to appoint, by a just construction of that instrument. It is alleged in the bill that this estate was limited to interest, as synonymous with income, rents and profits, *eo nomine*, and did not extend to the fee of the real estate, nor to the principal of the stock settled to the uses of the marriage. By every sound rule of construction, an instrument should be interpreted by the context, so as if possible to give a sensible meaning and effect to all its provisions; and so as to avoid rendering portions of it contradictory and inoperative, by giving effect to some clauses to the exclusion of others. Expounded by this rule, let us see what will be the character of the estate here limited to the wife, and what the extent of her power to appoint in relation thereto.

§ 350. *Rule of construction here applied so as to favor a power of appointment co-extensive with the whole property settled.*

The deed of settlement begins by reciting: "That, whereas the said Harriet V. Nicoll is now possessed of a considerable real and personal estate, which it has been agreed should be settled to her sole and separate use, with power to dispose of the same by appointment or devise." The deed then sets forth the estate, real and personal, conveyed by it, and enumerates the trusts created thereby, and amongst them the one involved in this controversy, and differently interpreted by the parties thereto, as follows, namely: that the trustee "shall and do permit the said Harriet V. Nicoll, the intended wife, to have, receive, take and enjoy all the interest, rents and profits of the property hereby conveyed, to and for her own use and benefit; or to the use of such person or persons, and in such parts and proportions, as she, the said Harriet V. Nicoll, shall from time to time during the coverture, by writing, appoint, etc., or to such person or persons as she by her last will and testament, etc., may devise or will the same to; and in default of such appointment and devise,

then the estate and premises aforesaid to go to those who may be entitled thereto by legal distribution."

Let it be here remarked that the object of the deed is declared to be the settlement of the whole of the estate, real and personal, upon the married woman, with power to dispose of the whole of it, either by appointment or devise. It will not be denied that this investment of, and authority over, the whole estate, so explicitly declared, might not have been modified or even revoked by subsequent provisions of the same instrument; but certainly they should be made to yield only to declarations equally explicit, or to such as are absolutely contradictory to and irreconcilable with them. Can it be correctly affirmed of the subsequent and specific designation of the trusts in this deed that they are either plainly contradictory or irreconcilable with the purposes of the settlement previously and so explicitly declared? May not the term interest, contained in that enumeration, considered in its relative collocation to the terms rents and profits, be understood as equivalent with the word estate, especially when the terms rents and profits may be correctly taken to cover interest understood as mere revenue, and still more especially when we keep in view the previous purpose set forth in the deed,—that of settling on the *feme*, and subjecting to her disposition by deed or will, the whole of her estate, real and personal? Certainly, there is nothing in the term interest incompatible with the meaning of the terms estate or property, for in an ordinary, as well as in a technical, acceptation, interest may imply both estate and property. But there is another illustration of this matter which would seem to put it beyond further doubt that the power of appointment in question cannot, by any rational construction, be restricted to interest understood as revenue or money, or to rents and profits *hiis nominibus*. Let it be again remarked that, by the preceding part of the marriage contract, all the estate, real and personal, was settled to the *feme*, with power to appoint the whole, without exception, by deed or will. Then, after the words which it is insisted for the complainant restricted her power, we have, at the conclusion of the deed, these words: "And in default of such appointment or devise, then the estate and premises aforesaid to go to those who may be entitled thereto by legal distribution." Now the construction which would restrict her power to interest, rents and profits would seem as if intended to make the fee or inheritance dependent upon the contingency of an appointment of these mere chattel interests by the *feme*; if she failed to appoint these, which alone it is insisted she had power to appoint, then, as a condition or consequence, "the estate and premises aforesaid" to go to those who may be entitled thereto by distribution. Let it be supposed that, being thus restricted, she does appoint these chattel interests; what, then, becomes of the inheritance or fee? The *feme* cannot, according to the argument, control, or appoint it either by deed or will; this, it is said, is beyond her power. Does it not, in this aspect of the case, descend or become subject to distribution precisely as it was to do as the condition of non-appointment? So that, whether she appoints or not, the fee or inheritance goes precisely the same way. This construction renders the provisions of the marriage contract useless and unmeaning. It contemplates on the part of the wife an action wholly nugatory as to the ultimate disposition of the fee, which it places entirely beyond her control either by deed or by will, and leaves it to pass according to the law of inheritance whether she be active or quiescent. This confusion and obscurity in the construction of the contract is removed by taking the con-

text,—by connecting the first clear and positive declaration of its objects, namely, the settlement on the *feme* of all her real and personal estate, and the power in her to appoint the same by deed or will, with the concluding provision of that contract, which declares that, in default of appointment or devise, “then all the estate and premises aforesaid,” covering the whole deed; not the interest on money, not the dividends on stocks, nor profits of any kind, but the whole estate conveyed and settled, shall go to those who may be entitled thereto by legal distribution. This construction gives consistency and meaning to the entire contract, and satisfies us that the power of appointment reserved to the wife was co-extensive with the whole estate and subjects of the settlement.

§ 351. *Alleged defective execution of a power of appointment considered, and appointment decided to have been properly made.*

It remains next to be considered whether the mode of appointment prescribed or indicated by the marriage contract, whether the power be construed in an extended or restricted sense, has been strictly or fairly and substantially complied with. On behalf of the appellant it is insisted that, in the deed of the 9th day of October, 1827, from John H. Ladd, the trustee in the marriage settlement, and Harriet V. Ladd to John Hooff, as trustee for the Farmers' Bank of Alexandria, regarding that deed as an appointment by Mrs. Ladd, under a competent power, still, in its execution, there has been such a departure from the mode prescribed for the exercise of the power by Mrs. Ladd, as renders her act wholly inoperative and void. The marriage contract, after securing the property settled to the use of the wife, proceeds thus: “Or to the use of such person or persons, and in such parts and proportions, as she, the said Harriet V. Nicoll, shall appoint from time to time, during the coverture, by any writing or writings under her hand and seal, attested by three credible witnesses.” The deed to Hooff, it will be seen, after reciting that John H. Ladd, the trustee in the marriage contract, in execution of the trusts expressed and declared in the marriage contract, and for a pecuniary consideration, does grant, bargain and sell to Hooff; and, after further recital, that “the said Harriet V. Ladd, in execution of the power of appointment to her reserved in the settlement, does hereby direct and appoint the premises hereinbefore described to be held by the said John Hooff and his heirs on the uses and for the purposes and trusts before recited,” concludes in the following language: “In witness whereof the said John H. Ladd, Harriet V. Ladd and John Hooff have hereunto set their hands and seals the day and year first before written.” Then, after the names and seals of the parties are written, in the usual place of attestation, these words: “Sealed and delivered in presence of George C. Kring, John McCobb, Matthias Snyder, Charles Muncaster, Jonathan Field.”

Upon this state of facts, it has been contended that the execution of the power was defective and null, inasmuch as the power could be executed only by an instrument under the hand and seal of the married woman, and that the attestation of the witnesses shows simply a sealing and delivery of the deed of appointment, and shows nothing in relation to the signing by the parties. Some objection was made in the argument, founded upon the relative position of the names of the attesting witnesses, as tending to produce uncertainty as to which of the parties the witnesses meant to testify; but this objection, whether or not under other circumstances it might have been of any importance, was obviated by an exhibition in court of the original deed, which it was admitted was the document before the court below in the trial of this

cause. In considering this objection to the defective attestation of the instrument of appointment, it is to be observed that the complainant, by her bill, does not impeach the deed on any such ground; on the contrary, she expressly alleges that this deed was signed and executed by all the parties thereto, and witnessed by the four persons whose names appear thereon. Such being the state of facts, it may very properly be questioned whether a party admitting and averring the execution of an instrument, and impeaching only its fairness or its legal operation, exhibiting nothing in the state of the pleadings requiring his adversary to establish the execution of such instrument, can, even in the court of original cognizance, be permitted to deny or question at the trial the existence or execution of the document against his own averment or admission. Such a proceeding would be a surprise in the court below; but it would be still more so if, after the trial, and without even an exception indorsed upon the document, it could be objected to before an appellate tribunal. There is no exception taken to the form or attestation of this deed of appointment found in the record before us. But was there not proof of the full execution of this power, inclusive of signing, according to approved legal intendment? One of the earliest cases, perhaps the earliest, going directly to sustain the exception here urged to the execution of the power, is that of *Wright v. Wakeford*, 17 Ves., 454. In that case, as in the one before us, the contract creating the power directed the appointment to be made by writing or writings under hand and seal; and in that case as in this, the memorandum of attestation was in the words "sealed and delivered," omitting to assert in terms the signature by the maker. Lord Eldon forbore to decide whether this certificate or memorandum embraced the signing as well as the sealing and delivery of the instrument, and sent the case to the common pleas, who certified (three of the justices, Heath, Lawrence and Chambre, concurring against the opinion of Mansfield, C. J.) that in their opinion the power had not been well pursued.

After *Wright v. Wakeford*, followed the cases of *Mansfield v. Peach*, 2 Maule & Sel., 576; *Wright v. Barlow*, 3 Maule & Sel., 512; *Hotchkiss v. Pierce*, 6 Taunt., 402. These cases rest upon *Wright v. Wakeford*, and some if not all of them refer to it expressly as their foundation. But, even contemporaneously with the cases just mentioned, it will be perceived that the courts have, in some instances, sought to free themselves from these literal trammels of *Wright v. Wakeford*, as too narrow to comprise the principles of justice and common sense; for as early as 7 Taunt., 355, in the case of *Moodie v. Reid*, which was sent from the chancery, the will was attested in this general phrase, "witness, etc.," by two witnesses. In the *testimonium* clause the testatrix says: "These bequests are signed by me." Gibbs, C. J., said that this was clearly a good attestation of the signing. Still later, it has been ruled in several cases where the power required a will signed and published in presence of three witnesses, that the attestation was good expressing the will to have been signed and delivered. The evident disposition of the courts being to adopt the reason and substance of the transaction, they have, as matter of construction, determined that delivery was publication. See 4 Sim., 558; 5 Sim., 118.

But, whatever doubt may heretofore have overhung and perplexed this matter, that doubt, so far as the reasonings of the English bench should shed light upon the judicial mind of our country, ought to be cleared away. This effect, we think, should be produced by the arguments, in the house of lords, of the assembled judges in the case of *Burdett v. Spilsbury*, reported in 6 Man-

ning & Granger, beginning at p. 386. In this case, presenting, as of course, an exhibition of great ability and learning, the execution and attestation of appointments under powers are the subjects considered. The cases from *Wright v. Wakeford* down, involving any important principle, are reviewed, and these subjects placed upon the basis of common sense. It is true that the facts in the case of *Burdett v. Spilsbury* were not precisely those of *Wright v. Wakeford*, the attestation clause in the latter being special, and that in the former case not special; yet, in the examination of the latter case, and of those which have followed and been rested upon it, their doctrines are discussed and by a majority of the judges disapproved, several of the judges who conceived themselves constrained to support *Wright v. Wakeford*, upon the maxim *stare decisis*, expressing their regret at the obligation supposed to be binding upon them, and declaring that, were the case *res integra*, they should certainly reject its doctrines. The extended views of the judges in *Burdett v. Spilsbury* cannot be given consistently with the limits of this opinion, yet some of their illustrations of the principles they maintain may properly be adverted to. And it will be perceived that the substance and meaning of those principles are comprised in the following positions:

1. That the terms and modes prescribed in settlements for the execution of powers should be followed in reason and substance, so as to insure the purposes and objects contemplated by such settlements, and so as to prevent them from being sacrificed to mere literal severity of construction.

2. That the memorandum of attestation to a deed or will, whether that memorandum be general or special, is not conclusive as to the ceremony of the execution of the instrument to which such memorandum is annexed, but may be explained by the testimony of the witnesses themselves, or by reference to the *testimonium* clause of the instrument, as showing the facts and circumstances set forth in that clause, and which the witnesses were called on to attest.

Thus, in the case of *Burdett v. Spilsbury*, p. 392, Wightman, J., says: "The power requires that the instrument shall be signed, sealed and published by the testatrix in the presence of three witnesses, and that they shall attest the instrument. No form of attestation would, for the first thirty years, have dispensed with the necessity of calling one of the subscribing witnesses, if any were alive, to prove that the formalities required by the power had been complied with; but after thirty years, the case would rest upon the presumption arising from the production of the instrument itself. In the present case, the instrument shows a general attestation of it by three witnesses, without any statement of the particular facts they attested; but they must be understood to have attested something; and to ascertain what that is, there is no principle of law, nor any authority of which I am aware, that prohibits a reference to the instrument itself; and if we look at the instrument for information as to that which it is to be presumed the witness did attest or witness, what do we find? Upon the face of the instrument which the witnesses attest, the testatrix says: "I do publish and declare this to be my last will and testament. In witness whereof I have set my hand and seal to this my last will and testament;" and then follows a signature and seal purporting to be those of the testatrix. But, supposing such a special form of attestation as that contended for had been adopted, it would not have varied the character of the evidence derived from the terms of the instrument, and the general attestation of the witnesses. It would but have raised a presumption for the jury that they did

witness that which is stated in the attestation, subject to any doubt that might be raised as to whether they really did witness that which is stated in the written attestation or not."

In the same case, Williams, J., says: "Now, the language of the power (as has been already mentioned) is, by her last will and testament, to be by her signed, sealed and published in the presence of, and attested by, three or more credible witnesses. All this is found to have been done; and we are now to see whether, by ordinary and fair construction, neither forcing any interpretation in favor of it, nor wholly excluding any reasonable inference for the mere purpose of defeating what we know to have been rightly done, the requisites appear to have been complied with. And here it seems very important to attend particularly to the document itself. The will first contains the whole testamentary part; every disposition of the property is first fully made, and the will is therefore as to that, its principal object, complete. The rest regards the manner of the execution. It is thus: "I declare this only to be my last will and testament. In witness whereof I have to this my last will and testament, contained in one sheet, set my hand and seal." The testatrix signed this part twice, once after the above words, and again where her seal is affixed, and directly opposite to the latter is the word witness, and immediately under it are the names of the witnesses; and the question is, whether it is to be understood that they attested, or, in other words, were witnesses to anything; and if so, how much? And, first, it is to be asked, for what purpose was this *testimonium* clause (as it has been called) introduced, or rather added? Certainly not to explain or to qualify the will, or any part of it. To its provisions it has no allusion; but it respects the forms to be observed in the execution of the will, and that only. Why are we to suppose that the testatrix was ignorant of the terms upon which alone her dispositions could be available? This, the language of the clause shows, she did understand. The clause, therefore, having this object, we come to consider the purpose for which the witnesses are introduced, and I confess I cannot conceive it possible to understand the meaning of their presence, except to witness something. If it be said, and with truth, that the witnesses cannot be presumed to be cognizant of the contents of the will, because that is contrary to experience, it is surely somewhat contrary to the same experience to suppose that, when the presence of the witnesses is to be accounted for only by their being brought there to witness something, certain ceremonies were performed, but that they saw nothing of them, and that, too, when the very language of the *testimonium* (I declare, etc.) imports that the testatrix was making the declaration, not to the winds, but to persons to whom she might address herself, who were there to see and hear. If, then, the witnesses must be understood to have attested something, I can see no possible reason for stopping short of the conclusion that they attested everything which by the clause purports to have been done, that is, signing, sealing and publication." Again, by the same justice, p. 433: "Now, in *Wright v. Wakeford*, the power required the consent of A. and B., testified by writing or writings under their hands and seals, attested by two or more credible witnesses. The attestation clause is sealed and delivered by the within named A. and B., in the presence of C. B. and G. B. Here, the ceremony of signing was omitted in an attestation which professed to give an account of what had been done, and there was not, as in the present case, a *testimonium* clause."

In speaking of *Wright v. Wakeford*, Gurney, Baron, remarks: "It is impos-

sible to mention the names of Lord Eldon and the three other judges of the common pleas, Heath, Lawrence and Chambre, otherwise than in terms of great respect. Nevertheless, with all the respect which is due to their authority, I cannot but think it most unfortunate that this decision was ever made. It has led to great injustice. It has disappointed the just expectations of sellers and devisors, and involved the courts in great difficulties." So, too, Lord Brougham, p. 466: "I hardly know a case which has excited, at different times, more remark than *Wright v. Wakeford*. It has been again and again questioned, it has been again and again criticised, by the learned judges. It cannot, therefore, be said to have been at any time a case that commanded anything like the entire concurrence of Westminster Hall."

The reasoning of Tindal, C. J., in *Burdett v. Spilsbury*, applies with great force and clearness to the question before us. "If," says this judge, "the word 'witness' is taken abstractedly by itself, as constituting the whole of the attestation, I can see no objection to holding that the three persons whose names are subjoined to it must be taken to be witnesses to all that was actually done at the time, which is found by the special verdict to be all that was required to be done. Or, if the word witness is to be construed with reference to the statement immediately preceding it at the end of the will, then the word witness necessarily implies that the testatrix did in their presence declare the instrument to be her will, and that she did in their presence put her hand and seal thereto, that is, in the language of the settlement, that she signed, sealed and published it in the presence of these three witnesses. To this construction an objection was taken at your lordship's bar, which had also been relied upon by some of the learned judges who delivered their opinions before me; namely, that it proceeds upon the supposition that the whole instrument may legally be read together to explain the meaning of the word witness, and that it supposes the witnesses are conusant of the contents of the instrument, neither of which can be supposed. But I cannot feel the force of this objection. There has been, from the earliest time at which deeds were known, a marked and acknowledged distinction between the operative part of the deed itself, and the testimonium clause (as it is called) at the end of the deed. The essential part of the deed is that part, and that only, which contains the grant. The clause at the end is introduced, not as constituting any part of the deed, but merely to preserve the evidence of the due execution of it. Admitting, therefore, the deed itself is matter which may be held to be confined to the knowledge of the parties, namely, the grantor and grantee, the *testimonium* clause is expressly introduced into it for the use of the public and the witness to the deed. It is well known that a similar clause was constantly inserted in old deeds and charters, at the close thereof, beginning with the words *hii testibus*, and thence generally called the *hii testibus* clause, in which the names of the persons present, who heard the deed read by the clerk, were written, not by themselves, but by the clerk who prepared the deed. Spelman, in his Glossary, p. 228, traces out the variations in the form of the clause, at different periods of our history; and Madox, in the Defrutation prefixed to his *Formulae Anglicanum*, goes more fully into the matter, and in the work itself gives numerous instances which it is impossible to read without being satisfied that the sense requires that the witnesses, whose names are inserted in the *hii testibus* clause, must of necessity have known the words preceding it, or in fact they would have witnessed nothing at all. Take, for example among many, that numbered 313: "And that this my gift, grant and confirmation may re-

main firm forever, I have confirmed this present charter with the impression of my seal, *hinc testibus*," etc. Who can doubt, for a moment, that these witnesses either actually read, or heard read over to them, the words of the deed immediately preceding their names, and that the introduction of the preceding clause had no other object or purpose? And this practice continued down to the reign of Henry VIII., as appears by the authority of Lord Coke, who states the practice then began of separating the attestation from the deed itself, and for the witnesses to subscribe their own names to it, either at the bottom of or indorsed upon it. But that the clause *in cujus rei testimonium*, so long as it was found at the close of the deed itself, never formed part of the deed itself, is evident from Shepard's Touchstone, where he says: 'A deed is good albeit these words in the close thereof, *in cujus rei testimonium sigillum meum apposui*, be omitted,'—citing authorities which show that it is no more in fact than what it imports to be, the very attestation of the deed which has preceded it. There is therefore no reason why the word witness, written immediately after this *testimonium* clause, should not be considered as incorporated with it, and as calling the attention of the witnesses to all that had preceded in the *testimonium* clause." Again, it is said by the same judge, p. 459: "So far from its being a rule of law that you may not, in the attestation of a deed, look back to that which is found at the close of the deed itself, that, on the contrary, in most of the cases which have been relied on by the defendant in error, express reference has been made to the close of the deed itself.

A quotation from the opinion of Lord Campbell will close these extracts from the opinions in *Burdett v. Spilsbury*, protracted, perhaps, beyond what even this interesting case will warrant. His lordship says, p. 467: "My lords, in this case the only question is, whether the will was attested by three credible witnesses." He proceeds, p. 468: "My lords, independently of authority, I cannot doubt that for a moment. The only objection that can be made is this: that the will upon the face of it does not contain any process verbal or history of the transaction. But the power imposes no such condition—it does not say a will, signed, sealed and published in the presence of three witnesses and attested by them, and a will containing a history of the solemnity—there are no such words in the power." Again, p. 469: "If it were necessary, my lords, I think the *testimonium* clause here might be resorted to, both upon principle and authority." These reasonings of the English judges, going to show that, upon principle, and independently of recent statutory provisions, the memorandum of attestation, so far from being conclusive upon the facts of signing, sealing and publishing or delivering an instrument, may itself be controlled, either by the examination of the witnesses themselves or by reference to the *testimonium* clause of such instruments, are fully sustained, and even more than sustained, by the authority of the supreme court of that state from whose jurisprudence and policy this controversy might be supposed in some degree to take its complexion. If, therefore, the most express adjudication of the court of appeals of Virginia can govern this case, it seems at once disembarassed of the objections alleged to the execution of the power created by the marriage contract.

The recent decision in the case of *Pollock v. Glassell*, 2 Gratt., 439, would seem to be decisive of the questions now before us, that case having clearly ruled as the law of Virginia with regard to a deed, that, although the distinctive character of the instrument is to be determined by its intrinsic evidence, the question is still open whether it be the deed of the party, and that must be

decided by evidence *aliunde*. If by plea of *non est factum*, or other proper denial, the fact that the paper was sealed by the party be put in issue, then it must be proved by competent and satisfactory testimony. In Virginia, by long usage, which has received the sanction of a statute, a scroll is used by way of a seal. The decisions have required that the substitution of the scroll for a seal shall be recognized on the face of the deed, but in no case has it been held that, in the absence of such recognition, evidence is inadmissible to prove that in fact the scroll was affixed to the instrument with intent that it should stand in place of a seal. In the case above referred to, it is said by the court: "Here the question occurs in a court of probate, whose province it is to examine the subscribing witnesses, and, if their testimony is satisfactory, to establish and perpetuate the due execution of the instrument. Upon what principle or authority are the subscribing witnesses to be estopped, because of some informality in the paper, from proving the fact that it was sealed by the testatrix, or, what is the same thing, that she adopted the scroll affixed to it by way of seal? In the much stronger case of a deed, there could be no such estoppel in a court of probate." In the same case the court say, through Baldwin, J.: "It will be seen that the statute requires the will to be attested by the witnesses, but does not prescribe what, nor that any, facts shall be stated in their attestation. I think it plain that the legislature meant nothing more than that the instrument itself should be attested in order to identify the witnesses and designate who are to prove its execution. The object was not to obtain from the witnesses a certificate of the essential facts of the transaction, but to provide the means of proving them by persons entitled to confidence, and selected for the purpose. The subscription of their names denotes that they were present at and prepared to prove the due execution of the instrument so attested, and nothing more. The attestation is the act of the witnesses, and it was not intended to confide to them the duty of stamping their testimony upon the paper; which would avail nothing as evidence, however perfect, and which ought to create no estoppel, however imperfect. This view of the statutory provision is in effect sustained by the English decisions." Again, p. 465, it is said by the same judge: "I think it clear that the subscription of the witnesses is substantially the attestation contemplated by the statute; and it is sufficient if the purpose be indicated by the briefest memorandum, or merely by a fair presumption arising from the local position of their signatures upon the paper; and whether a memorandum of attestation be general or special, it may be denied or contradicted by the subscribing witnesses, in the whole or in part, and of course is open to explanation if in any way ambiguous." The court then proceed to review the case of *Wright v. Wakeford*, and the cases of *Doe v. Peach*, *Wright v. Barlow*, and *Moodie v. Reid*, rejecting them as authority in the state of Virginia as to the form and influence of the memorandum of attestation, and concurring with the doctrines declared by the majority of the judges in *Burdett v. Spilsbury*, 6 Man. & G., 386.

An objection has been made to the sale under the deed of trust, based upon the fact that the portion of the property actually sold did not equal in value the whole amount of the debt due to the bank, which it is insisted should have been the case, according to the proviso in that deed. We do not see the force of this objection, inasmuch as, by the express terms of the deed, authority was given the trustee or the bank to sell the property in separate parcels, as either might deem it necessary or advisable; and it would have been impracticable before an experiment to ascertain *a priori* how much of the property would

be requisite for the satisfaction of the debt, and thus a literal adherence to the proviso would lead either to the preventing a sale altogether, or to the sacrifice of the whole estate, whether there should have been a necessity for it or not. Moreover, the sale by parcel in this case was selected upon a calculation of advantage to the *feme*, and with her express approbation, with the view of saving to her, if practicable, a portion of the property.

Upon full consideration of the facts and the law of this case, the court are of the opinion that the marriage contract gave power to the *feme covert* to appoint the entire estate and property embraced within it; that the provisions and conditions of that contract have been complied with in the execution of the power thereby created and reserved; that therefore the decree of the circuit court, dismissing the bill of the appellant, the complainant below, ought to be affirmed, and it is hereby accordingly affirmed.

DE LANE v. MOORE.

(14 Howard, 253-268. 1852.)

APPEAL from U. S. Circuit Court, Middle District of Alabama.

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—The appellants, in the year 1847, filed their bill in the court aforesaid against the appellees, seeking of them a discovery as to certain slaves charged to have come to the possession of their testator, and also an account and a recovery of the value, increase, hires and profits of those slaves, and claiming by name a negro woman named Linda or Linder, together with her children.

The bill charges that, in the year 1816, Mrs. Ann Wood De Lane, a widow lady residing in the state of South Carolina, and possessed of valuable real estate, and of sundry slaves, being about to intermarry with one John Yancey, an ante-nuptial contract was entered into and executed between these parties. The stipulations in this contract, which is made an exhibit with the bill, are to the following effect: That "all the estate of the said Ann, real and personal, should be and remain for the joint use, support and enjoyment of the said John and Ann during their joint lives, and to the survivor of them during his or her life; that the same should be free from any debts, dues, demands or contracts of said Yancey, unless it should be under the following restrictions: That the said John Yancey should not have the right to dispose of any portion of the estate or property, real or personal, unless the said Ann should consent thereto. That the said John should have the right to dispose of the property upon his obtaining such consent. That the said Ann should have the right of granting or withholding her consent without resorting to the aid of a court of equity, or to the intervention of a trustee. That all transfers by the said John of any portion of the property with the consent of the said Ann should be valid, whether made for his separate use and benefit or for the joint use of himself and wife; and that the said John should not be compellable to settle any equivalent for property so transferred, unless there should be a stipulation between the parties to that effect. That all of the estate, real or personal, which should remain undisposed of during the joint lives of the parties, should be for the use and benefit of the survivor; and at his or her death should be equally divided amongst all the children of the said Ann, both of this and of the former marriage. That none of the aforesaid estate, real or personal, should be liable for any debts, judgments or executions that might be in ex-

istence at the date of the contract or at any time thereafter against the said John, unless by mutual consent of the parties. The bill further charges that, the marriage having taken place between the said Ann Wood De Lane and John Yancey, they removed to the state of Alabama, where the said Ann having died, the said Yancey, who survived her, sold to James L. Goree, deceased, either during the life-time or after the death of the said Ann, but without her consent and in violation of the ante-nuptial agreement, several of the slaves mentioned in that agreement. That the said Philip H. De Lane, Martha Chiles and Grace Lykes, who are the children of Ann W. De Lane, by her first marriage, and her only heirs, were, at the date of the sale aforesaid by Yancey, infants of tender years.

The bill makes no persons defendants, and seeks relief against none others, except the said Andrew B. Moore and James L. Goree, the executors of James L. Goree, deceased.

The respondents deny all personal knowledge of a purchase of slaves by their testator of Yancey, but state that they have been informed and believe that the decedent did, in his life-time, and in the life-time of Ann W. Yancey, obtain from the said John Yancey, in the year 1822, a negro woman slave named Lindy and her child Becky, in payment of a store account contracted with the decedent whilst a merchant in Alabama by said John and Ann Yancey for sugar, coffee, pork, butter, clothing and other necessities for the support of the said John and Ann and of the complainants, the children of the said Ann, and of the slaves conveyed in the marriage settlement. The respondents deny that any slave mentioned in that agreement, except the woman Lindy, ever came to the possession of their testator, and after naming the offspring of Lindy they aver that this female slave and her offspring were never held by the respondents in any other right than as the executors of James L. Goree, deceased; that long before the institution of this suit the respondents, as such executors, had delivered over to the distributees of their testator all the slaves held by them, had settled their account as executors, and received a discharge, namely, on the 2d day of January, 1846. Having made the above statements in answer to interrogatories put by the bill, the respondents propound these separate averments, and claim to be allowed the benefit of them as if specially pleaded.

1. That their testator was a *bona fide* purchaser of the slave Lindy for valuable consideration without notice of the alleged marriage settlement.

2. That more than six years had elapsed between the death of Yancey, who survived his wife, and the commencement of this suit, and therefore the suit is barred by the statute of limitations.

3. That the said marriage settlement was made in the state of South Carolina and was not recorded according to the laws of that state, and is therefore void, both as to the respondents and to their testator, who was a *bona fide* purchaser without notice.

4. That if the marriage settlement had been properly recorded, or was otherwise valid, the sale of the slave Lindy was made with the assent of the said Ann Yancey.

5. That the respondents received the said slaves as the executors of the last will and testament of decedent, as a part of his estate, and had, before this suit was commenced, disposed of them according to the provisions of said will, by distribution and delivery to the legatees of said estate, and that long be-

fore the commencement of this suit had made a final settlement of said estate and had been discharged from said executorship.

To the answer of the respondents the complainants filed a general replication, and upon the pleadings and proofs in the cause the district court, on the 7th of December, 1849, pronounced a decree dismissing the bill of the complainants with costs. The correctness of that decree we will proceed to consider.

§ 352. *The rule of law as to the admission of secondary evidence of written papers.*

The first question which presents itself in the natural order of investigation of the proceedings of the district court is that which was raised upon the admissibility in evidence of an authenticated copy of the ante-nuptial contract, upon the sufficiency of the cause assigned for the non-production of the original. The cause so assigned was this: The three children of Mrs. De Lane, with the husbands of the two daughters, depose that they never possessed nor ever saw the original contract; that they have made diligent inquiry for it, but have been unable to learn either its present existence or place of existence — and believe that it has been lost or destroyed. And the son, Philip De Lane, states further that he had made inquiry for it first of John Partridge, his guardian, who informed him that he had never been in possession of it and did not know where it was; that deponent had also made inquiry for it at the office of mesne conveyances, and at the office of the secretary of state of South Carolina, but upon search and inquiry it could not be found at either of those places; and he believes that this instrument was either destroyed by said Yancey, or by fire when the court-house in Monroe county, in Alabama, was burned in 1833 — that the subscribing witnesses to the agreement, he believes, after diligent inquiry, are dead. That Yancey died in 1836, in Mississippi, utterly insolvent, and no person ever administered on his estate. In disregard of these affidavits the district court refused to consider the copy of the ante-nuptial contract as legal or admissible in the absence of the original, and in this refusal we think that the court has erred. Upon the most obvious principles of reason and justice, we think that the complainants could not have laid a stronger foundation for the introduction of the secondary proof. The custody of the original document, or the duty of preserving it, could in no view be brought home to them. And its absence, therefore, over which they could have had no control, and produced by no default of theirs, should not have deprived them of the effect of that document to avail for whatever it might be worth. This view of the question before us is strengthened by the obvious considerations that no suspicion justly attaches to the complainants from the non-production of the original agreement, and that its exhibition was calculated rather to corroborate than to weaken their claims. The instances in which secondary evidence is to be admitted, and the requisites demanded by the courts to warrant its introduction, are treated of in the elementary works on evidence, as for instance, in 2 Saunders on Pleading and Evidence, 833 *et seq.* But in a decision of this court this subject has been dealt with in a manner so strikingly apposite to the question now before us, as to warrant particular notice thereof, as being in all respects decisive of that question. We allude to the decision of *Taylor v. Riggs*, 1 Pet., 591. That case presented by no means so strong a claim for the introduction of secondary evidence as does the one now under consideration, for that was an application for leave to sub-

stitute parol for written evidence, and not for the substitution of an authenticated copy of a written and recorded document in lieu of the original. In *Tayloe v. Riggs*, the chief justice lays down the law as follows:

"The rule of law is, that the best evidence must be given of which the nature of the thing is capable; that is, that no evidence shall be received which presupposes greater evidence behind in the party's possession or power. The withholding of that better evidence raises a presumption that if produced it might not operate in his favor. For this reason, a party who is in possession of an original paper, or who has it in his power, is not permitted to give a copy in evidence, or to prove its contents. When, therefore, the plaintiff below offered to prove the contents of the written contract on which this suit was instituted, the defendant might very properly require the contract itself. It was itself superior evidence of its contents to anything depending on the memory of a witness. It was once in his possession, and the presumption was that it was still so. It was necessary to do away this presumption, or the secondary evidence must be excluded. How is it to be done away? If the loss or destruction of the paper can be proved by a disinterested witness, the difficulty is at once removed. But papers of this description generally remain in possession of the party himself, and their loss can, in most instances, be known only to himself. If his own affidavit cannot be received, the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, would amount to a complete loss of his rights, at least in a court of law. The objection to receiving the affidavit of the party is, that no man can be a witness in his own cause. This is undoubtedly a sound rule, which ought never to be violated. But many collateral questions arise in the progress of a cause to which the rule does not apply. Questions which do not involve the matter in controversy, but matters auxiliary to the trial, which facilitate the preparation for it, often depend on the oath of the party. An affidavit of the materiality of a witness for the purpose of obtaining a continuance, or a commission to take a deposition, or an affidavit of his inability to attend, is usually made by the party and received without objection. So affidavits to support a motion for a new trial are often received. These cases, and others of the same character which might be adduced, show that in many incidental questions that are addressed to the court, and which do not affect the question to be tried by the jury, the affidavit of the party is received. The testimony which establishes the loss of the paper is addressed to the court, and does not relate to the contents of the paper. It is a fact which may be important as letting the party in to prove the justice of the cause, but does not of itself prove anything in the cause. As this fact is generally known only to the party himself, there would seem to be a necessity for receiving his affidavit in support of it."

The law, as thus clearly declared by this court in *Tayloe v. Riggs*, is in strictest accordance with the rule prevailing in the supreme court of the state within which the case before us was decided. Thus in the case of *Sturdevant v. Gains*, 5 Ala., 435, that court thus announces the rule by which they are governed with respect to the introduction of secondary evidence: "In the recent case of *Jones v. Scott*, 2 Ala., 61, it is stated that no fixed rule can be laid down as applicable to this class of cases; that, in general, search must be made where the lost paper was last known to be. These remarks are quite applicable to this case. Search was made where the paper was last known to be only three days before." Again: "We cannot say that half an hour's

search in a lawyer's office, was not sufficient to ascertain whether the paper was not where it was left, nor, in the absence of any fact indicating that it might be found elsewhere, can we perceive that there was any necessity to search elsewhere for it. If the admission that the paper, on further search where it was last known to be, or elsewhere, might still be discovered, would preclude the secondary evidence, it would annihilate the rule in all cases where the lost paper was not proved to be destroyed as well as lost, as otherwise there must always be a possibility that it may be found."

§ 353. *An ante-nuptial contract binds the parties from the time of its execution. If recorded, it binds creditors and purchasers according to the law of the state.*

With regard to the position insisted upon in the answers, that the ante-nuptial contract was void for the failure to record it within three months from its date, in conformity with the law of South Carolina, that position, however maintainable it might be, so far as the instrument was designed to operate by mere legal or constructive effect on creditors and purchasers, becoming such before it was recorded, or, in the event of its never being recorded, cannot be supported to the extent that, by the failure to record it within the time prescribed by the statute, the deed would thereby be void to all intents and purposes. Such a deed would, from its execution, be binding at common law *inter partes*, though never recorded; and if, after expiration of the time prescribed by statute, it should be reacknowledged and then recorded, either upon such reacknowledgment, or upon proof of witnesses, it would, from the period of that reacknowledgment and admission to record, be restored to its full effect of notice, which would, by construction, have followed from its being recorded originally within the time prescribed by law. These conclusions are sustained by numerous decisions. We refer, in support of them, to the cases of *Turner v. Stip*, 1 Wash. (Va.), 319; *Currie v. Donald*, 2 Wash. (Va.), 58; *Eppes v. Randolph*, 2 Call, 125; *Guerrant v. Anderson*, 4 Rand., 208; *Roanes v. Archer*, 4 Leigh, 550; *Wood v. Owings*, 1 Cranch, 239; *Sicard v. Davis*, 6 Pet., 124.

The ante-nuptial agreement between Ann Wood De Lane and John Yancey is proved to have been executed on the 20th day of May, 1816; if it was admitted to record at any time before the 20th of August, in the same year, it operated as notice to all creditors and purchasers becoming such subsequently to the execution of that agreement; if it was not recorded until the 14th of November, in the year 1816, it could, by construction, operate as notice from the latter period only, but as between the parties, and with regard to subsequent creditors and purchasers with notice, it operated from the period of its execution. The sole purpose of recording the deed is, that those who might deal with the parties thereto, or with the subjects it comprised, should have knowledge of the true condition of both, and if such knowledge is presumed, nay, established by legal inference from the fact that the deed has been recorded *a fortiori*, it must be established by actual notice.

§ 354. *An ante-nuptial contract valid in the state where executed continues valid when the parties have removed to another state with the property.*

It has been made a ground of defense, in the answers in the court below, and it has also been insisted upon in argument here, that admitting the ante-nuptial contract to have been recorded in the state of South Carolina, and, in consequence thereof, to have been so operative as to affect with notice creditors and purchasers within that state, yet that, upon the removal of the parties, carrying with them the property into another state or jurisdiction, the

influence of the contract, for the protection of the property, would be wholly destroyed, and the subject attempted to be secured would be open to claims by creditors or purchasers subsequently coming into existence. The position here advanced is not now assumed for the first time in argument in this court. It has, upon a former occasion, been pressed upon its attention, and has been looked into with care, and, unless it be the intention of the court to retrace the course heretofore adopted, this may be now, as it formerly was, called an adjudged question. The case of *The United States Bank v. Lee*, 13 Pet., 107, brought directly up for the examination of this court, the effect of a judgment and execution obtained by a subsequent creditor in the District of Columbia, upon property found within that District, but which had been settled upon the wife of a debtor, by a deed executed and recorded in Virginia, according to the laws of that state, the husband and wife being, at the time of making the instrument, inhabitants of the state of Virginia. The question was, by Mr. Justice Catron, who delivered the opinion of the court, elaborately investigated, and the cases from the different states, founded upon their registry acts, carefully collected. The cases of *Smith v. Bruce*, 3 Harr. & J., 499, and *Crenshaw v. Anthony*, Mart. & Yerg., 110, cited by the learned judge, fully sustain his reasoning upon the point. This court come unhesitatingly and clearly to the conclusion that the deed of settlement, executed and recorded in favor of Mrs. Lee, in conformity with the laws of Virginia, protected her rights in the subject settled, against the judgment of the subsequent creditor, in the District of Columbia. We should not be disposed to disturb the doctrine laid down in the case of *The Bank of the United States v. Lee*, and in the decisions of the state courts of Maryland and Tennessee, above mentioned, if the rights of the parties turned upon the operation of the contract as constituting notice; or upon the proof of knowledge on the part of Goree, the purchaser from Yancey, of the existence of the marriage contract. But we think that the rights of the parties to this controversy should not be made to depend upon any such incident as the existence of notice of the contract, either actual or constructive.

§ 355. *Parties under no disability, who for many years sleep upon their rights, cannot enforce them through a court of equity.*

It has been premised, in the statement of the pleadings in this case, that the only defendants in the court below were the executors of James L. Goree, deceased, called upon in their representative character, and in no other. The marriage contract between Ann W. De Lane and John Yancey was executed in 1816. It is proved that Yancey died in 1833 or 1834. The complainants are the children of Mrs. Yancey by her first marriage; so that, at the time of the death of Yancey, the youngest of those children, if born immediately preceding the second marriage, could not have been younger than seventeen years; the elder children were then probably nearly or fully at majority. After the death of Yancey, the record discloses no claim on the part of the complainants, nor any effort by them to recover the property settled by the contract earlier than 1842, eight or nine years after Yancey's death; at which last period, it is said, there was a suit pending in one of the state courts against the testator of the appellees, but which suit, after being revived against the appellees, subsequently to the death of their testator, was, in the year 1843, dismissed for the want of prosecution. The bill in this suit was filed in January, 1847, at an interval of thirty-one years after the execution of the marriage agreement, and of fourteen years after the death of Yancey; from which last

event the complainants had an undoubted and unobstructed power to seek their rights under that contract, whatever they were.

If mere tardiness in asserting their pretensions were all that could be imputed to the appellants, this of itself would place them in a position which could not commend them to the countenance of courts of justice; but this delay is by no means the only or the least imputation resting upon the course of the appellants; for we see that, after calling upon the appellees for satisfaction of their demand, the appellants abandoned that demand, proclaiming thereby to the representatives of Goree (if, indeed, they were then in possession of the subject), permission to apply it in conformity with the will of their testator. The appellants, it is not pretended, ever held or claimed the subject in dispute, except in their representative capacity, and in trust for the creditors and legatees of their testator. In the interval between the abandonment of their first and the institution of their second demand by the complainants, those executors have, in fulfillment of their trust, handed over the subject to those for whom they held it under the will; have accounted with the authorities to whom they were responsible, and have received from those authorities a full acquittance. Under these circumstances, to hold them liable to the demands of the appellants, would, in effect, be to render penal the regular discharge of their duty.

This aspect of the cause we regard as fully warranting the decree of the district court dismissing the bill of the complainants; that decree is therefore affirmed.

HUNTER v. BRYANT.

(2 Wheaton, 82-44. 1817.)

APPEAL from U. S. Circuit Court, District of Pennsylvania.

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—This is an appeal from a decree in equity, in the district of Pennsylvania, on a bill filed by Thomas Y. Bryant against the legal representatives of John Hare. The object of the bill is to charge the lands of Andrew Hare, now deceased, through John Hare, to the appellants, defendants in the court below, with the payment of a bond for \$5,000 and interest, given by Andrew Hare, in contemplation of marriage with Margaret Bryant, the mother of John Hare. The land lies partly in the state of Kentucky, and partly in the Mississippi territory, and five of the defendants live in the state of Pennsylvania, the sixth in the state of Virginia. The bill was originally filed against all six of the legal representatives of John Hare; but the name of Mary Dickenson, the resident in Virginia, being stricken out by leave of court, five only were made defendants below.

The bond is executed to George Hunter and William Hunter, two of these appellants. The penalty is in the usual form, and bears date the 10th of November, 1789. The condition is in these words: "Whereas, by the permission of God, a marriage is intended to be had and solemnized between the above bound Andrew Hare and Margaret Bryant, of the city of Philadelphia, spinster; and the said Andrew Hare, in consideration of the said marriage, and to secure a decent and competent support to and for his said intended wife, as well during the marriage as after his death, in case she should survive him, and to all and every the child or children which may be born of the said marriage, in case he should survive her, hath agreed that the sum of five thousand

Mexican dollars, part of the estate whereof, by the blessing of God, he is now possessed, and the interest and income thereof accruing annually, should be vested in trustees for the sole and separate use of the said Margaret Bryant, his intended wife, or the children born of her body, in the manner herein-after mentioned. Now, the conditions of the above obligation is such that, if the said Andrew Hare do, and shall, within the time of his life, or within the term of one year after the marriage shall take effect (whichsoever of the said terms shall first expire), convey and assure to the above-named George and William Hunter, the next friends of the said Margaret Bryant, and trustees by her for this special purpose chosen, or the survivor of them, or his heirs, executors, administrators or assigns, some good estate, real or personal, sufficient to secure the payment of three hundred Mexican dollars as aforesaid, to the trustees, or the survivor of them, on every the 10th day of November, in every year after the date hereof, for the sole and separate use of the said Margaret, his intended wife, during the intended marriage; which annual payment shall be at her own disposal, and shall be paid upon her own orders or receipts, independent and free from the intermeddling charge or control of her said intended husband, and shall not be liable to any of his contracts, debts or engagements whatsoever; and also sufficient to secure the payment of the sum of \$5,000 as aforesaid to and for the sole use of the said Margaret, in case she shall survive her said intended husband, to be paid to the said trustees, or the survivor of them, for her use, within six months next after the death of her said intended husband; and, in case of her death before her said intended husband, to be paid to the said trustees, or the survivor of them, for the use of all and every of the child or children of the said Margaret, to be born in pursuance of the intended marriage, to be equally divided amongst them, if more than one; but if but one, then the whole to the use of the said one. Or, if the said Andrew Hare shall die before the said Margaret, and by his testament and last will shall, within the said year from the date hereof, give and bequeath to her such estates, legacies, bequests and provisions as shall be fully adequate to the provisions here intended to be made for her, and her child or children; then, and in either of the said cases, the above written obligation shall be void, otherwise the same shall remain in full force and virtue at law, in this state of Pennsylvania, and in all other states or kingdoms whatever."

The marriage accordingly took effect, and except when the husband was necessarily absent, in prosecution of his business as a merchant, the parties lived constantly together in great harmony, and in a style fully consonant with the husband's resources. In 1793 he established himself in Lexington, Kentucky, and was engaged in mercantile transactions until his death, which happened in 1799.

By his will, Andrew Hare devised a tract of one thousand acres of land lying in the Mississippi territory, to his son John, in fee. A tract of ten thousand acres in the state of Kentucky equally between his wife and son, with a devise over to her in fee of the son's moiety if he died before he attained "the lawful age to will it away." And the rest and residue of his estate, real and personal, he gives to be equally divided between his wife and son, with the same contingent devise over to her as is given with regard to the Kentucky tract of ten thousand acres. The value of the property thus devised to her, independent of the contingent interest which has since fallen, might reasonably have been estimated at the time of the testator's death at about \$5,000.

§ 356. *Nuncupative wills; validity in Kentucky.*

In 1801, about eighteen months after the husband, the wife died; after having made a nuncupative will, by which she devised all her estate, "whether vested in her by the will of Andrew Hare, her deceased husband, or otherwise," to be divided between her son John and the complainant below, Thomas Y. Bryant, with a contingent devise of the whole to the survivor. John Hare died, aged about eleven years; and under this nuncupative will it is, that Thomas Y. Bryant derives his right to this bond. According to the laws of Kentucky, this will was not sufficient to pass the landed estate of Margaret Hare, but it is good as to the personal estate, including the bond, which was the subject of this suit.

§ 357. *Election between a devise, and a specific sum due the devisee.*

The defense set up in the answer below is, that the provision made in the will of the husband for his wife must be taken in satisfaction of this bond, inasmuch as he would otherwise have left his child, who ought to have been, and evidently was, the primary object of his care, probably destitute of support. And this court unanimously acquiesce in the correctness of this reasoning. For every bequest is but a bounty, and a bounty must be taken as it is given. Positive words are not indispensably necessary to attach a condition. It may arise from implication, and grow out of a combination of circumstances which go to show that, without attaching such condition to a bequest, the primary views and prominent duties of the testator will be pretermitted. In this case, in addition to the striking improbability of the testator's intending to leave his child destitute, or even dependent, there are two circumstances which tend to show that the testator had no expectation that, in addition to the provision for his widow, his estate was to be made liable for this heavy debt. First, the condition of the bond holds out the alternative of making provision by will, in satisfaction of it. And, although we do not accede to the construction contended for, that this necessarily extended to his whole life, but think it was, in legal strictness, limited by the latter words of the condition, to his death within one year, yet the words in the prior part of the condition, "within the term of his life," were well calculated to excite in the mind of a man, whose habits of thinking had not been corrected by technical exercise, an idea that he was legally, as well as conscientiously, complying with his obligation when executing this will. Secondly, the principal part of his bounty to his wife consists of the one-half of the rest and residue of his estate, with a contingent devise over to her of the other half, on the decease of his son; thus disposing of the whole, and giving to her the one-half of the natural and ordinary fund for the payment of this bond; a disposition of his effects that would have been idle under the supposition that this bond was to be exacted of his estate.

§ 358. *Where devisee dies before making election, his representative may elect whether election was made during life.*

But in the actual state of the rights and interests of these parties, at least in the view which this court takes of them, this question becomes a very immaterial one. For the complainant, Bryant, acquires nothing of the estate of Andrew Hare, under the will of Mrs. Hare, but that part of the personalty which she acquired under the residuary bequest of her husband. And this being unquestionably the fund first to be applied to the payment of debts, it must, in his hands, be first subjected to the payment of this debt. It is only as connected with Mrs. Hare's acquiescence or election to take under the will that the question of satisfaction becomes material. In which case we should

be bound to dismiss the bill altogether, on the ground of satisfaction. But here we are of opinion that the evidence of election is not sufficient to bind Mrs. Hare. That she was perfectly at liberty to reject the provision under the will of her husband, and rest alone on her bond, is unquestionable. And if this election was never deliberately made, in her life-time, there can be no reason for denying the extension of it to her representative, Bryant. He now makes that election in demanding the payment of this bond, and we conceive that nothing unequivocally expressive of that election has before occurred, at least nothing that ought to preclude it. If the will had expressly given the property devised to her in satisfaction of this bond, she would have been put on her guard, and more cautious conduct might have been required of her; but, although a court may raise the implication, she was not bound to do it, and her mind was not necessarily led to an election. It is true that in her will she notices the property acquired under her husband's will; but this is perfectly consistent with the idea that she took, under her husband's will, something in addition to her interests under the bond independent of that will. We are therefore of opinion that the complainant is entitled to satisfaction of this bond; and as, in the course of events, the interests of the obligees, who stood in the relation of trustees to Margaret Bryant, have become hostile to those of the *cestui que trust*, he must have the aid of this court to enforce it. The only questions, then, are how the bond shall be stated, and how the money shall be raised. And here the question occurs, on the allowance of interest during the husband's life-time.

§ 359. *Actual maintenance by husband equivalent to payment of sum secured for separate maintenance, in the absence of complaint.*

On this subject, the majority of the court is satisfied that actual maintenance is equivalent to the payment of a sum secured for separate maintenance. It is true, the husband cannot claim his election; but if the wife and her trustees never demand it, it is considered as an acquiescence, or waiver, on their part, and this court will not afterwards enforce payment. 2 P. Wms., 84; 3 P. Wms., 355; 2 Atk., 84; 4 Bro. Ch. Cas., 326. In the present case, there is nothing in the bond that holds out the idea of making this interest an accumulating fund; no demand of a settlement was ever made; the parties lived together in perfect harmony, and the wife was maintained in a style fully adequate to the provision stipulated for. This bond was intended as a provision against the husband's inability or unwillingness to maintain his wife; but whilst steadily pursuing his avocation as a merchant, and faithfully discharging his duties as a husband, the reasonable conjecture is that it was thought really best for his family not to withdraw so large a sum from his small capital. If the trustees or the wife had desired that the settlement should be made in pursuance of the condition, they might have demanded it, and enforced a compliance at law or in equity. We therefore think that interest on the bond is not to be computed during the husband's life.

§ 360. *On what funds bond for payment of money, after the principal's death, should be charged.*

The only remaining question is, how the money is to be raised, or on what funds the bond is to be charged. And here there can be no doubt that the first fund to be exhausted is the residue of the estate; and of this, the personal residue first in order. This, of course, sweeps all that part of Andrew Hare's estate that Bryant acquired under the will of Mrs. Hare; and included in this, we find Hustin's bond for \$3,272.86. The one-half of this bond was

decreed in the court below to be an equitable offset against Hare's bond. All we know on the subject of this offset is extracted from the confessions of the complainant himself. From these it appears that the testator, Hare, held a bond of Hustin's for the delivery of a quantity of pork. This bond it was proposed to exchange for one for the delivery of a quantity of tobacco; and the testator, in his life-time, dispatched the complainant as his agent, with instructions to effectuate the exchange. To enable him to do so, he assigned the bond for the pork to the complainant, instead of executing a common power of attorney. Whilst absent for this purpose, and before he had completed the arrangement with Hustin, Hare died; and Bryant proceeded no further until he had consulted Mrs. Hare and Mr. Todd, as executrix and executor of the will of Hare, on the propriety of proceeding. "On conferring with Mrs. Hare and advising with Mr. Todd," to use Bryant's own equivocal language, he effected a negotiation, and, having received the tobacco, took it down to New Orleans, where, not meeting with a ready sale, he deposited it with one Moore, the factor and correspondent of Hare, in his life-time. He took Moore's receipt for the tobacco so deposited, and all that we are told of the transaction subsequently is that, at the instance of Mr. Todd, he assigned that receipt to some house under the firm of John Jordan & Co.; but who they were, or what finally became of the tobacco, the case does not show; and, for aught that appears to us, the proceeds of that adventure may at this day lie in the hands of the factor, subject to the order of the executor of Andrew Hare.

§ 361. *Liability of executors who take inferior security, or unreasonably extend time of payment.*

The court below thought these facts sufficient to charge Mrs. Hare with one-half the amount of Hustin's bond. But this court are of opinion that the evidence is not sufficient for them to decide finally on the subject. Although it be generally true that the executor, who by taking an inferior security, or unreasonably extending time of payment, brings a loss upon his testator's estate, shall himself be liable, yet there are many objections to applying that principle to this case. The executor who takes charge of the affairs of a man in trade must necessarily, on the winding up of his affairs, be allowed a reasonable latitude of discretion; and in general, where there is manifest fidelity, diligence and ordinary judgment displayed, this court will always, with some reluctance, enforce the rigid rules which courts have been obliged, for the protection of estates, to impose upon the conduct of executors. In the principal case, the language of Thomas Bryant is by no means positive as to the consent of either the executor or executrix to this transaction. He says that he did it "after conferring with Mrs. Hare and advising with Mr. Todd." But it does not follow that either of them assented because they were consulted, or that they did anything more than express an opinion on the expediency of the measure. Neither of them had then qualified, nor was it at all certain that they would qualify, and the only person then empowered to act on this subject was Bryant himself, who, by virtue of the assignment which he held, possessed a power which legally survived his principal. Under this assignment it was that the negotiation was effected, and not by virtue of any power derived to him from the supposed assent of the executrix. Moreover, admitting the consent of the executrix, it is still doubtful whether any change of security did in fact take place. For Hustin still remained the debtor; the articles of agreement substituted for the original bond bear the

aspect of the purchase of a bond rather than the relinquishment of an advantage; the greater part, if not the whole balance, of the original debt was also payable in tobacco; and if the loss finally sustained proceeded, as is probable, from the insolvency of the factor, and not the reduced value of the commodity, this was by no means a necessary consequence of the change. Upon the whole, we are of opinion that the estate of Margaret Hare ought not in this mode, and upon the evidence now before us, to be charged with any part of Hustin's debt. For aught we know, Bryant may himself be liable for the whole by means of his mismanagement in the agency, or it may be in the power of the defendants to prove such acts of the executrix as may amount to a *devastavit*. On these points we do not mean to express an opinion or prejudice the rights of the appellants. We only mean to decide that the evidence in this case is not sufficient to sustain this discount.

After having settled these principles, the decree below must be reversed, and the cause remanded for such further proceedings as are necessary to carry into effect the views of this court. But as only five-sixths of the land are represented in this court, we can decree for only five-sixths of the balance of the bond. After applying to it the residuary personal estate, for the balance the complainant will have to pursue his remedy against Mary Dickenson, unless the representatives shall have the prudence voluntarily to join in any sales of land that may be made under this decree. (a)

JACKSON v. JACKSON.

(1 Otto, 122-127. 1875.)

APPEAL from the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—This was a suit for divorce. The decree was in favor of the wife on account of cruel treatment by the husband. The questions involved upon the appeal were upon an issue of property rights. The other facts appear fully in the opinion.

Opinion by MR. JUSTICE FIELD.

The land in controversy in this case was purchased by the wife with money which she had previous to her marriage, given to her by her father. The buildings erected thereon were constructed partly with such money, and partly with her subsequent earnings. The deed of the land was taken in her name; the contract for the houses was made by her alone with the builder; the policy of insurance upon the buildings was executed to her; and she paid the taxes upon the property.

§ 362. *Although under the common law the husband is entitled to his wife's personality and her earnings, he may yet permit the same to be invested in real estate for her separate use, if his existing creditors be not thereby prejudiced.*

It is true that at the date of the marriage, and when the land was purchased and the improvements were made, the common law governed in the District of Columbia as to the rights of married women to the personal property possessed by them previous to their marriage, and not secured by a settlement or contract to their separate use, and as to their subsequent earnings. By that law the money which the wife then possessed and her subsequent earnings belonged exclusively to her husband. They vested as absolutely in him as though the money had been originally his, and the earnings were the proceeds of his own labor and industry. This harsh rule of the common law was founded

(a) Reversing Bryant v. Hunters, * 3 Wash., 48.

upon the idea that as the husband was bound by the marriage to support the wife and the rest of the family, he was entitled to whatever she possessed or subsequently acquired which was available for that purpose,—a rule which would have had some good ground for its existence had it only applied when the money or earnings of the wife were necessary for that purpose. But, becoming absolutely the property of the husband, they were subject to his disposal without regard to the necessities of the family, and might be taken from them at the suit of his creditors. They partook of the condition and were subject to the fate of his separate property.

§ 363. — *such investment would constitute a voluntary settlement upon her, to which the law of resulting trusts does not apply.*

But though the money which the wife in the present case had at her marriage and her subsequent earnings must be regarded as the property of the husband, it was competent and lawful for him to allow her to invest them for her own use, so as to be beyond his reach and control. Being at the time free from debt, he could have taken whatever money she had, whether given to her or earned by her own labor, and purchased with it the land in controversy, and received the deed in her name. The investment would then have been an advancement for her benefit,—a voluntary settlement upon her; and the subsequent application of her earnings to the construction of improvements would have equally been a legal disposition of them. The improvement of property settled upon the wife is not forbidden to the husband, if not made with a fraudulent intent; and the moneys used for that purpose do not interfere with any rights of existing creditors.

The law on the subject of post-nuptial settlements of this character is well settled, and will be found stated in numerous adjudications of the American courts. *Picquet v. Swan*, 4 Mason, 444 (§§ 372–82, *infra*); *Haskell v. Bakewell*, 10 B. Mon., 206. The doctrine of resulting trusts arising where a conveyance is taken in the name of one person and the consideration is advanced by another has no application to investments of this kind. Such trusts are raised by the law from the presumed intention of the parties, and the natural equity that he who furnishes the means for the acquisition of property should enjoy its benefits. But no presumption that a personal benefit was intended to the party advancing the funds for a purchase in the name of another can arise where an obligation exists on his part, legal or moral, to provide for the grantee, as in the case of a husband for his wife, or a father for his child. The circumstance that the grantee stands in one of these relations to the party is of itself sufficient evidence to rebut the presumption of a resulting trust, and to create a contrary presumption of an advancement for the grantee's benefit. *Murless v. Franklin*, 1 Swans., 17; *Grey v. Grey*, 2 id., 597; *Finch v. Finch*, 15 Ves., 50; *Guthrie v. Gardner*, 19 Wend., 414; *Perry on Trusts*, secs. 143, 144.

The case of *Sexton v. Wheaton*, 8 Wheat., 229, which arose in the District of Columbia, is a determination of this court upon the points here presented. There the husband had purchased a house and lot within the District, and taken the conveyance in the name of his wife, and afterwards improvements were made upon the property. Subsequent creditors having obtained judgment against him, filed a bill to subject the property to its payment, contending that the conveyance to the wife was fraudulent and void as to them, and praying that, if the conveyance was sustained, the wife might be compelled to account for the value of the improvements. But the court held, Mr. Chief

Justice Marshall delivering its opinion, that the husband at the time being free from debt, the conveyance to the wife was to be deemed a voluntary settlement upon her, which, not being made with any fraudulent intent, was operative and binding against subsequent creditors; and that the improvements upon the property stood upon the same footing as the conveyance itself, they being made before the debts were contracted. The chief justice observed that it would seem to be a consequence of that absolute power which a man possesses over his own property, that he might make any disposition of it which did not interfere with the existing rights of others; that such disposition, if it were fair and real, would be valid; and that the limitations upon this power were those only which were prescribed by law. The chief justice then proceeded to show that the law only limited this power when its exercise impaired the rights of existing creditors; and that a voluntary settlement by a husband in favor of his wife could not be impeached by subsequent creditors, unless it was made to defraud them.

The present case is one much stronger than the case cited; for here there are no creditors complaining. It differs from the one cited in this, that the investment was made directly by the wife, instead of being made through the husband; but we do not perceive in this fact any valid objection to the legality of the transaction. There can be no doubt that she acted with his approval. Fifteen years of acquiescence in her holding the land in her name, and in making improvements thereon with her earnings, ought to be deemed satisfactory evidence of his original authorization of the investments. The amount paid for the land was only \$300 (less than one-sixth of the sum received from her father), and the whole cost of the improvements for the fifteen years was only about \$2,000; and it does not appear that any third parties have been in any respect prejudiced by the investments, or have ever questioned their validity.

§ 364. *A decree of divorce granted the wife on account of cruel treatment by the husband is not of itself sufficient reason to restore to him any rights to property settled upon the wife.*

The divorce decreed was not of itself a sufficient reason for restoring to the husband any rights to the property thus settled upon the wife. That was granted for cruel treatment, and, whatever may be the power of the court over the property of parties upon the dissolution of the marriage relation, there was no call for its exercise in a case like the present.

The decree of the supreme court of the District, so far as it awards any portion of the property in controversy to the husband, and directs a conveyance by the wife to him, must be reversed; and it is so ordered.

MR. JUSTICE DAVIS assented to the legal propositions advanced by the court, but held that the evidence did not authorize the application that was made of them.

JONES v. CLIFTON.

(11 Otto, 225-231. 1879.)

APPEAL from U. S. Circuit Court, District of Kentucky.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—This is a suit by Stephen E. Jones, assignee in bankruptcy of Charles H. Clifton, to set aside two deeds executed by the latter to

his wife, and to compel a transfer of the property embraced in them to the complainant. Clifton married in 1870, and was possessed at the time of a large estate. Previously to his marriage he had taken out three policies of insurance on his life, each for \$10,000. Soon after his marriage he took out two additional policies on his life, each for the same amount as the previous ones. In October, 1872, by his deed-poll he conveyed to his wife, in consideration of the love and affection he bore her, to hold as her separate estate, free from his control, use and benefit, a small parcel of land in the city of Louisville, in the state of Kentucky, and by the same instrument, upon the like consideration, and to be held for the same separate use of his wife, he assigned to her the five policies of insurance on his life. The deed contained a clause reserving to himself the power to revoke the grant and assignment, in whole or in part, and to transfer the property to any uses he might appoint, and to such person or persons as he might designate, and to cause such uses to spring or shift as he might declare.

In April, 1873, by another deed-poll he conveyed to his wife, upon like consideration of love and affection, to hold as her separate estate, free from his control, use, or benefit, two other parcels of land; one consisting of a lot in the city of Louisville, Kentucky, and the other his country place in the county of Jefferson, in that state, comprising thirty-eight acres. The instrument contained a reservation of a power of revocation and appointment to other uses similar to that of the first deed, the power of appointment, however, being somewhat fuller, in providing for its execution either by deed or writing, to take effect as a devise under the statute of wills in Kentucky.

These deeds were properly acknowledged and recorded in the counties where the real property was situated. At the time of their execution, the grantor was not in any business and did not intend engaging in any; was worth about \$250,000, and owed only a few inconsiderable debts, which were soon afterwards paid. The deeds were made at the urgent solicitation of his wife, who perceived that his habits were those of an indiscreet young man, somewhat inclined to dissipation, and she was naturally desirous of providing against a possible waste of his property.

In 1873 a general financial panic passed over the country; the values of all kinds of property greatly depreciated in the market, and land in the country could scarcely be disposed of at any price. By the shrinkage in values and losses in the subsequent years of 1874 and 1875, by his being surety for others, and by bad management, his estate was wasted, and he became hopelessly insolvent. In December, 1875, upon his petition, he was adjudged a bankrupt by the district court of Kentucky. The complainant was subsequently appointed assignee of his effects, and received an assignment of his property. The proved debts against him amounted to \$13,000, and his estate in the hands of the assignee was of little value.

The assignee seeks to set aside the deeds upon various grounds, which, however, may be embraced in the following: 1st. That they are void because made directly to his wife, without the intervention of a trustee, and so passed no interest to her; 2d. That, by the reservation to the grantor of a power of revocation and appointment to other uses, they were designed to hinder and defraud his future creditors, whilst he retained the control and enjoyment of the property; and 3d. That the power of revocation and appointment were assets which passed to the assignee in bankruptcy, and can be executed by him for the benefit of creditors.

§ 365. *A voluntary settlement of property by a husband upon his wife is valid unless existing claims of creditors be thereby impaired.*

The questions thus presented, though interesting, are not difficult of solution. The right of a husband to settle a portion of his property upon his wife, and thus provide against the vicissitudes of fortune, when this can be done without impairing existing claims of creditors, is indisputable. Its exercise is upheld by the courts, as tending not only to the future comfort and support of the wife, but also, through her, to the support and education of any children of the marriage. It arises, as said by Chief Justice Marshall in *Sexton v. Wheaton*, 8 Wheat., 229, as a consequence of that absolute power which a man possesses over his own property, by which he can make any disposition of it which does not interfere with the existing rights of others. In that case the husband had purchased a house and lot within the District of Columbia, and taken the conveyance in the name of his wife, and afterwards made improvements upon the property. Subsequently he became involved in debt, and his creditors, having obtained a judgment against him, filed a bill to subject this property to its payment, contending that the conveyance to the wife was fraudulent and void as to them, and praying that if the conveyance were upheld the wife might be compelled to account for the value of the improvements. But the court held, after an extended consideration of the authorities, that, as the husband was at the time free from debt, the conveyance was to be deemed a voluntary settlement upon her; and as it was not made with any fraudulent intent, it was valid against subsequent creditors; and that the improvements upon the property stood upon the same footing as the conveyance, it appearing that they had been made before the debts were contracted. That case does not differ in principle from the one before us. The husband in this, as in that one, was free from debt when he made the deeds, which were voluntary settlements upon his wife. It cannot make any substantial difference that in the case cited the money of the husband was expended in the purchase of the property, and the conveyance was taken in the name of the wife; and that in the present case the property was owned at the time by the husband, and was transferred directly by him to her. The transaction, in its essential features, would have been the same as now, if the husband had sold his lands and invested the proceeds in other property and taken a conveyance in her name.

§ 366. *A husband's conveyance to his wife, by way of settlement, may be made directly to her without the intervention of a trustee.*

The circuitry of the proceeding would not have altered its character nor affected its validity. In all cases where a husband makes a voluntary settlement of any portion of his property for the benefit of others who stand in such a relation to him as to create an obligation, legal or moral, to provide for them, as in the case of a wife, or children, or parents, the only question that can properly be asked is, Does such a disposition of the property deprive others of any existing claim to it? If it does not, no one can complain if the transfer be made matter of public record, and not be designed as a scheme to defraud future creditors. And it cannot make any difference through what channels the property passes to the party to be benefited, or to his or her trustee,—whether it be by direct conveyance from the husband, or through the intervention of others. The technical reasons of the common law arising from the unity of husband and wife, which would prevent a direct conveyance of the property from him to her for a valuable consideration, as upon a

contract or purchase, have long since ceased to operate in the case of a voluntary transfer of property as a settlement upon her. The intervention of trustees, in order that the property conveyed may be held as her separate estate beyond the control or interference of her husband, though formerly held to be indispensable, is no longer required. This has been established in courts of equity, says Story, for more than a century, so "that whenever real or personal property is given or devised or settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights and claims of her husband, and of his creditors also." Eq. Jur., sec. 1380. And he adds to this observation, that "it will make no difference whether the separate estate be derived from her husband himself or a mere stranger; for, as to such separate estate, when obtained in either way, her husband will be treated as a mere trustee, and prohibited from disposing of it to her prejudice." There is nothing in the circumstances attending the execution of the deeds in this case which should prevent the full application of the doctrine stated for the protection of the wife's interest against the claim of the assignee for the benefit of the creditors of the husband. *Lloyd v. Fulton*, 91 U. S., 485.

§ 367. *The power of revocation reserved in a voluntary conveyance does not impair its validity.*

The powers of revocation and appointment to other uses reserved to the husband in the deeds in question do not impair their validity or their efficiency in transferring the estate to the wife, to be held by her until such revocation or appointment be made. Indeed, such reservations are usual in family settlements, and are intended "to meet the ever-varying interests of family connections." *Riggs v. Murray*, 2 Johns. (N. Y.) Ch., 565. So frequent is the necessity of a change in the uses of property thus settled, arising from the altered condition of the family, the addition or death of members, new occupations or positions in life, and a variety of other causes which will readily occur to every one, that the absence of a power of revocation and of appointment to other uses in a deed of family settlement has often been considered a badge of fraud, and except when made solely to guard against the extravagance and imprudence of the settler, such settlements have in many instances been annulled on that ground. Several of them are cited in the very able and learned opinion of the district judge who presided in the circuit court when this case was there heard. The law in England, by which property can be kept in the same families for many years, has, perhaps, caused greater importance to be given in that country than in this to the insertion in deeds of settlement of a power of revocation and appointment to other uses. Here the absence of the reservation is only a fact to be explained, and is to have more or less weight, according to the circumstances of each case. In the case before us the husband does not appear to have had his attention drawn to the reservation. He desired to have the property settled upon his wife, and he intrusted the preparation of the deed to his counsel. There was clearly no fraudulent intent on his part; no proof of any such intent was produced or stated to be in existence. The only fraud asserted in argument to exist is constructive fraud arising from the reservation in question. But its presence in the deed, as is clear from all the authorities, does not tend to create an imputation upon his good faith and honesty in the transaction. *Huguenin v. Baseley*, 14 Ves., 273; *Coutts v. Acworth*, Law Rep., 8 Eq., 558; *Wollaston v.*

Tribe, 9 id., 44; *Everitt v. Everitt*, 10 id., 405; *Hall v. Hall*, 14 id., 365; *Phillips v. Mullings*, Law Rep., 7 Ch., 244; *Hall v. Hall*, 8 id., 430; *Toker v. Toker*, 3 De G., J. & S., 486.

As is very justly observed in the opinion of the court below, the insertion of the power of revocation and new appointment, so far from proving that the grantor contemplated a fraud upon his future creditors, tends to show the contrary. Should he revoke the settlements, the property would revert to him, and, of course, be liable for his debts; and should he exercise the power of appointment for the benefit of others, the estate appointed would be liable in equity for his debts.

§ 368. — *such power of revocation is not assets in bankruptcy.*

The title to the land and policies passed by the deeds; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will. The grantor could, indeed, exercise the power either by deed or will, but he could not vest the power in any other person to be thus executed. Nor is the power a chose in action. It did not, therefore, in our judgment, constitute assets of the bankrupt which passed to his assignee.

Decree affirmed. (a)

(a) The following are extracts from the opinion of BALLARD, J., of the circuit court:

Under the common law system the husband and wife are, for most purposes, regarded as one person. As a result of this legal unity, their contracts with each other, whether executory or executed, in parol or under seal, are void. This doctrine, it must be confessed, has little foundation in reason. It is wholly unknown in that enlightened system of jurisprudence which, coming down to us from the ancient civilizations, now prevails on the continent of Europe, and it has only a faint recognition in the system of equity jurisprudence which in England and in this country has grown up by the side of the common law. In equity the husband and wife are for many purposes treated as two persons. Whilst at law all the personal property of the wife becomes on marriage the property of the husband, and the entire management and profits of her real estate pass to him, in equity she may not only own and manage her real and personal estate, but she may dispose of it free from the control of her husband. True, it was at one time doubted whether any interest in either real or personal property could be settled to the exclusive use of a married woman, without the intervention of trustees; but for more than a century and a quarter it has been established in courts of equity that the intervention of trustees is not indispensable, "and that whenever . . . property . . . is settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights of her husband, and of his creditors also." 2 Story's Equity Jurisprudence, sec. 1380.

Nor is it at all material whether the settlement is made by a stranger or by the husband himself. In either case the trust will attach upon him, and will be enforced in equity. It is now universally held that a settlement made by a husband on his wife, by direct conveyance to her, will be enforced in the same manner and under the same circumstances that it will be when made by a stranger, or when made to a trustee for her exclusive use. *Shepard v. Shepard*, 7 Johns. Ch., 56; *Jones v. Obenchain*, 10 Gratt., 359; *Sims v. Ricketts*, 35 Ind., 192; *Thompson v. Mills*, 30 Ind., 532; *Putnam v. Bicknell*, 18 Wis., 336; *Burden v. Amperse*, 14 Mich., 91; *Barron v. Barron*, 24 Vt., 398; *Maraman v. Maraman*, 4 Met. (Ky.), 84; *Wallingford v. Allen*, 10 Pet., 594.

All voluntary conveyances, whether made wholly without consideration or upon the meritorious consideration of love and affection, are scrutinized and regarded with some suspicion in courts of equity, when they are sought to be impeached by creditors. But I have been referred to no case, and I have found none, which hints that a reasonable settlement made by a husband, free from debt, on his wife, by direct conveyance to her, is any more impeachable than when it is made through the intervention of trustees. Settlements made in either mode, when uncontaminated by actual fraud, are unimpeachable by subsequent creditors.

It may be admitted that a power of revocation, inserted in an assignment made by a debtor for the benefit of his creditors, would render such assignment constructively fraudulent, and therefore void. *Riggs v. Murray*, 3 Johns. Ch., 576; 8 C., 15 Johns., 571; *Tarback v. Marbury*, 2 Ver., 510. But such power of revocation has never been held to affect a family settlement. On the contrary, in the above case of *Riggs v. Murray*, Chancellor Kent expressly declares that "family settlements may often require such powers of revocation to meet the ever-varying interests of family connections." Moreover, it is the well-settled practice in England to insert such powers in such settlements, unless, indeed, the sole object of the settlement is to guard against the extravagance and imprudence of the settler. Indeed, ever since Lord Hardwicke's time, the failure of the conveyance to insert a power of revocation in a deed of family settlement has been regarded as a strong badge of fraud. *Huguenin v. Basely*, 14 Ves., 273.

In some of the later cases such settlements have been annulled at the suit of the settler, apparently on the sole ground that they did not contain a power of revocation. In *Coutts v. Acworth*, L. R., 8 Eq., 558, it was held that "the party taking a benefit under a voluntary settlement, . . . containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable." In *Wollaston v. Tribe*, L. R., 9 Eq., 44, the same rule is recognized and enforced. In *Everett v. Everett*, L. R., 10 Eq., 405, the chancellor, in annulling a deed of settlement, made by a young woman soon after she arrived at age, chiefly on the ground that it contained no power of revocation, says, in substance: "The sole object of the settlement being to protect the settler and her children, if she married, had I been called on for advice, I

SIMMS v. MORSE.

(District Court for Maryland: 2 Federal Reporter, 325-330. 1860.)

Opinion by MORRIS, J.

STATEMENT OF FACTS.—Bill in equity to set aside certain deeds as fraudulent and void, and in fraud of the provisions of the bankrupt act.

It appears from the proceedings and testimony that in 1868 Augustus Morse was the proprietor of the City Hotel, in Annapolis, which he had purchased, but had not paid for; that the furniture of the hotel belonged to his wife; that he was generally known to be in doubtful credit, difficult to collect any money from, and was, in reality, insolvent. In 1868 a property adjoining the hotel, on the Duke of Gloucester street, was offered at auction by the heirs of John Campbell, and was knocked down to Morse for \$1,800, and he then ostensibly became the owner of it; that on the 5th of November, 1869, a deed was put on record signed by the heirs of Campbell, conveying the property to Morse's wife, the deed being dated and acknowledged on the 3d of August, 1868, which was about the date of the sale; that on the 8th of November, 1869, a deed was executed and recorded, conveying the property from Mrs. Morse to Samuel Barth, in consideration of \$2,300; that on the 10th of May, 1869, a lease was executed and recorded, by which, in consideration of \$1,000 and the reservation of a rent of \$48 a year, extinguishable upon the payment of \$800, the property was conveyed by Barth to Martha R. Wilson; that on the 21st of April, 1869, Morse, on his own petition, was declared a bankrupt, and the complainants were subsequently appointed his assignees.

The bill alleges that the consideration for the property conveyed by Campbell's heirs to Caroline Morse was not paid by her but by her husband, and that Morse procured the deed to be made to her with design to defraud his creditors, and that the deed was kept unrecorded for fifteen months in furtherance of that design, he, in the meantime, holding himself out as the owner; that the consideration in the deed from Caroline Morse to Barth was not paid to

should have said: 'Have proper trustees, give her a voice in the selection of new trustees, and give her a power of revocation, with the consent of the trustees.' "

But whatever may be the true doctrine, all of the foregoing cases, and many more that might be cited, certainly do establish that it is ordinarily proper to insert a power of revocation in a voluntary settlement; nay, more, that the omission of such a power will subject the settlement to more or less suspicion. Certainly the practice in England for centuries has been to insert such a power in family settlements.

A practice which is thus approved by time, and which has received the sanction and encomium of courts of equity in both England and America, cannot be regarded as vicious or immoral. Should I hold that these settlements of Clifton are fraudulent and void as to his subsequent creditors simply because they contain powers of revocation, I should overturn an ancient practice and a long line of decisions; nay, I should hold that courts of equity have themselves advised frauds to be committed.

I know it is sometimes said that a court of equity will not enforce every deed made by a husband to his wife. Bishop on the Law of Married Women, section 717. The cases usually cited to support this view are *Beard v. Beard*, 3 Atk., 71; *Moyse v. Gyles*, 2 Vern., 385; *Stolt v. Ayloff*, 1 Ch. Rep., 33. Of all these cases it may be said that they were decided at a time when the rights of married women were not so fully acknowledged or so zealously protected by courts of equity as they are at the present day. It is also to be observed that in the first case the gift was so extravagant as to excite just suspicion of fraud and undue influence. In the second the court refused to aid the defective grant on the ground that it was without consideration. In the third the contract was executory. None of these cases would at all impeach a grant containing no more than a fair provision for the wife, and if they would, they are opposed to the cases heretofore cited in this opinion, to the well settled doctrine of the supreme court of the United States, and to the whole current of later authority.

When the settlement is made by a husband, free from debt, when it is induced by no fraudulent motive, when it makes no more than a reasonable provision for the wife, when it confers any benefit on her, I can conceive of no reason why a court of equity should decline to uphold it. Though the grant may not contain every provision which a chancellor would direct to be inserted in a settlement ordered by himself, though it contains reservations tending to impair the full benefit of the provision made for the wife, yet if the grant confers any substantial benefit on the woman, so long as she is in the actual enjoyment of that benefit, a court of equity should and will protect her. *Jones v. Clifton*, 2 Flipp., 191.

her but to her husband, and that Morse caused said deed to be made to Barth, who then had reasonable cause to believe Morse was insolvent or acting in contemplation of insolvency, with a view to prevent his property from coming to his assignee in bankruptcy, and in fraud of the provisions of the bankrupt act. The bill prays for a decree against Barth, and that Mrs. Wilson may be decreed to hold the property under the lease to her for the benefit of the assignees, and prays for other relief. The answers aver the good faith of all the transactions.

The testimony of Barth shows that he lived in Baltimore, and for a year or more prior to 1868 he had been dealing with Morse, and supplying the hotel with liquors, and that in November, 1868, Morse owed him a balance of \$398.75; that prior to the 5th of November, 1868, he cashed a draft for Mrs. Morse for \$625, drawn by her on her son-in-law in Massachusetts, with which money she proposed to pay a balance due on the purchase money of the property in question; that the draft came back to him protested, and he went to Annapolis to see Mrs. Morse about it; that she said to him she had expected the money from Massachusetts, but had been disappointed, and proposed to sell him the property for \$2,300; that he consented to take it at that price, provided she allowed him, as a payment on account of the purchase, the debt of \$398.75 due him by her husband, together with the draft he had cashed for her; that upon these terms he made the purchase, and paid to her the balance of the purchase money.

The contention of the complainants is that Barth knew that Morse had for a long time been insolvent, and knew that the property conveyed to his wife was paid for by him and conveyed to her in fraud of his creditors, and that Barth's purchase of the property was a method of securing the debt due him by Morse, and for that reason he aided Morse in conveying away the property in fraud of the bankrupt act.

The testimony shows that Barth, in November, 1869, had good reason to believe that Morse was insolvent, and had been so for some time; but there is no evidence to show that he had any knowledge that the property had not been bought by her, or that the money which had been paid on account of the purchase of the property in question was not Mrs. Morse's money, as she claimed. The testimony of Mrs. Morse, and of her husband and her son, tend to show that she did pay the money out of her own funds. Mrs. Morse, in her testimony, says: "I purchased the house on the Duke of Gloucester street, in Annapolis, from Mary A. Campbell and others. The deed was not put on record because the purchase money was not all paid until November, 1869. The last payment was procured by a draft on my son-in-law for \$600 or \$700, indorsed by Barth, which he paid. The balance of the money I obtained from the sale of real estate in Massachusetts belonging to myself, conveyed to me by deed, and I received some money from my sister."

§ 369. *When a wife's purchase of her husband's property is regarded as suspicious.*

The son testifies that he knows that his mother received the money from the sale of property in Massachusetts belonging to her, from being present at the sale; and Mr. Morse, the husband, testifies that all the money paid for the property belonged to his wife, except what was furnished by Barth. It was held by the supreme court of the United States, in *Seitz v. Mitchell*, 94 U. S., 580 (§§ 69-72, *supra*), that purchases of real or personal property made during coverture by the wife of an insolvent debtor are justly regarded with suspicion,

and that she cannot prevail in contests with his creditors unless the presumption that it was not paid for out of her separate estate be overcome by affirmative proof, and that the burden is upon the wife to prove distinctly that she paid for it with funds not furnished by her husband. This doctrine has been fully adopted and applied by the court of appeals of Maryland, in the recent case of *Henkle v. Wilson*, October 7, 1879. And in the present case it may well be that if this was a contest between Mrs. Morse and her husband's creditors, or his assignees in bankruptcy, the testimony given by herself, her husband and her son, although not contradicted or impeached, or shaken in any way (it having been taken in Brooklyn, under commission and without cross-examination), might not satisfy the court as to the source from which she obtained the money paid for the property, other than that furnished by Barth.

§ 370. — *how far the title of a bona fide purchaser from the wife under such circumstances should be protected.*

But this is not a contest with her, but a contest with one claiming to be a *bona fide* purchaser from her without knowledge of any weakness in her title. If the deed from Campbell's heirs had been made to Morse and the property then conveyed to his wife, the case would be clearly within the rule in *Green v. Early*, 39 Md., 223. The deeds would have disclosed that it was an acquisition of property by her from her husband, and Barth would have taken from her no better title than she had, and if she could not defend her title neither could he; but in the present case there was nothing, so far as the proof shows, to affect Barth with notice of any defect or latent equity in her title, except the fact that, at the time he was negotiating with her, her husband was insolvent and had probably been so for a considerable time previous. Granting that this was sufficient to have put him upon inquiry, what could he have learned? Both Mr. and Mrs. Morse then asserted that her money had been paid for the property, and they now, when they have less interest in the matter, solemnly swear to it, and the husband's creditors have been able to produce no direct evidence to discredit their statements.

§ 371. — *suspicion of fraud not to be held as notice of it against such party.*

Circumstances amounting to mere suspicion of fraud are not to be deemed notice, and where an inference of notice is to affect an innocent purchaser it must appear that the inquiry suggested would have, if fairly pursued, resulted in the discovery of the defect, where the title of the wife does not come through a conveyance from the husband, and is in form perfect, although impeachable by his creditors. I know of no case in which the title of a purchaser from her, having no knowledge of the weakness of her title, has not been upheld; and in the present case, without some authoritative decision, in the face of the affirmative testimony in support of the payment by her of the consideration of the deed to her, I should not feel justified in setting aside her conveyance to Barth. *Sedwick v. Place*, 12 Blatch., 174, affirmed, 95 U. S., 3; *Fletcher v. Peck*, 6 Cranch, 133; *Anderson v. Roberts*, 18 Johns., 515; *Ledyard v. Butler*, 9 Paige, 132.

The fact that, in the purchase of the property by Barth, he secured a debt due to him by the husband does not render the conveyance by the wife to him assailable. If the property was hers, and she chose to appropriate any part of it to the payment of any particular creditor of her husband, it is not a matter by which his assignee in bankruptcy or creditors are affected. *Stewart v. Platt*, Sup. Ct. U. S., October 7, 1879, reported in 12 Ch. Leg. N., 201 (Conv., §§ 1773-81). Bill dismissed.

PICQUET v. SWAN.

(Circuit Court for Massachusetts: 4 Mason, 448-467. 1827.)

Opinion by STORY, J.

STATEMENT OF FACTS.—This suit is brought by the plaintiff, an alien and subject of the king of France, against James Swan, a citizen of this state, as principal debtor, and against certain persons who are summoned as his trustees, viz., Harrison G. Otis, William Sullivan and Hepzibah C. Howard, to recover the amount of certain bills of exchange belonging to the intestate, and yet due and unpaid by Swan. The process is familiarly known among us by the appellation of the trustee process, and is more generally known elsewhere by the appellation of foreign attachment. It has its origin in the statute of 1794, chapter 65, which provides that any creditor entitled to an action against his debtor, "having any goods, effects or credits, so intrusted or deposited in the hands of others, that the same cannot be attached by the ordinary process of law, may cause not only the goods and estate" of the debtor "to be attached in his own hands or possession, etc., but also all his goods, effects, and credits so intrusted and deposited," etc., by an original writ, by which the debtor and the supposed trustee are summoned to appear, and answer to the suit in the manner prescribed by the act. In the present case the principal has not yet appeared; but the persons sued as trustees have appeared pursuant to the statute, and have made regular disclosures of facts under oath; and they now demand that they be discharged from the suit upon the ground that these disclosures establish that they have no goods, effects or credits of the debtor intrusted or deposited with them in the sense of the statute. The case, so far as respects them, is to be tried upon their answers, and no evidence *aliunde* is admissible to controvert or explain the facts stated therein. This is the known course under the statute, and has never been broken in upon by the legislature, except in a class of cases not necessary on this occasion to be noticed.

I own that I am one of those who are not inclined to give a larger operation to the statute than what its words clearly import. It is an extraordinary process, and from its very nature can afford but a very imperfect administration of rights and remedies as to the litigant parties. Nor as far as my limited experience has gone, has it enabled me to say that in complicated transactions, where various and conflicting rights have been brought forward for controversy, the result has in a general view been such as entitles it to peculiar public favor on account of its advancement of public justice. Cases like the present, full of nice law and refined equity, would seem hardly within its scope, and are far more fitted to be decided upon a bill in equity, where all the parties in interest may be brought before the court, and the whole facts may be put in controversy, and supported or repelled by the answers of the parties as well as by evidence drawn from disinterested sources.

§ 372. *Trustee process act of Massachusetts, in what cases applicable.*

If I were called upon to put a construction upon the words of the statute for the first time, I should not hesitate to say that it was meant to be limited altogether to cases where goods and effects, such as are liable to execution in ordinary cases, and are tangible, corporeal property, were in the hands and possession of the supposed trustee, for the sole use and benefit of the debtor, and under no claim of right or interest therein, contested or uncontested, on the other side; or to acknowledged deposits of money or credits admitted as real balances due from the trustee in money transactions or matters in account, between

the trustee and the debtor. And that it did not extend to cases where the trustee controverted the right of the debtor to any such goods, effects or credits altogether, or asserted any adverse interest, title or claim. This appears to me the true intention of the statute, as it is expounded by the simple words of the enacting clause, and more fully by the recital of the preamble. Whether decisions have gone to an extent beyond this reach of the words, it is not now necessary to consider. If they have, it may become my duty to follow them in the administration of local law; but I should hesitate much, before I should take a single new step, or make any new inroads upon the natural meaning of the words. Especially should I feel an almost insuperable repugnance to such a step, when it might vitally affect the interests of third persons not before court, who, in the character of *cestuis que trust*, or beneficial proprietaries, might have their rights concluded without any legal opportunity of presenting their whole merits. The foreign attachment custom of the city of London is probably the common origin of the statute process in the different states of this Union; and it is quite apparent that the principles of that process have never been supposed to reach cases where there were any trusts set up by the party in favor of third persons. See Com. Dig., Attachment, C. D.; *Blacquiere v. Hawkins*, Doug., 378. See, also, *Barnes v. Treat*, 7 Mass., 271. In the present case it is most manifest that all the parties in interest are not before the court, and that if the merits of the whole proceedings spread upon the record are to be examined into, and decided upon, it is quite probable that the rights of third persons may be most materially affected. I throw out these suggestions, not for the purpose of escaping from a decision upon the general questions presented in the cause, and which have been argued with so much ability and learning, but with the hope that they may attract the attention of abler minds, *valere quantum valere possent*.

FURTHER STATEMENT OF FACTS.—The first question presented by the disclosures arises from the post-nuptial settlements stated in the case. The first is by an indenture tripartite of the 14th of June, 1796, between John Coffin Jones, of the one part, James Swan and Hepzibah, his wife, of the second part, and Henry Jackson and Joseph Russell of the third part, reciting that Jones had on that day transferred to Jackson and Russell \$86,000 of the five and a half per cent. stock of the United States, in trust for the said Hepzibah, with the consent of her husband. The trusts expressly authorize her to receive the whole, principal and interest, to her separate use during her coverture, and to dispose of the same as she may please, during her life-time, and afterwards to appropriate the same to such persons as she should by deed, or by any writing purporting to be a last will and testament, limit, direct and appoint. It does not appear, from any recital in this indenture or otherwise, from whom the property so placed in trust was derived. Another indenture was executed between the same parties on the 25th of April, 1797, by which the additional sum of \$6,000 on the same stock was secured to Mrs. Swan upon the like trusts. On the 10th of October, 1796, an indenture was made between Henry Jackson of the first part, John C. Jones and Joseph Russell of the second part, and Mr. Swan and his wife of the third part, whereby certain real estate and mortgage securities thereon, then held by Jackson, were conveyed to Jones and Russell, upon trusts substantially similar in effect, though varying in some of the provisions from those before mentioned, and including a power of appointment of such estates by Mrs. Swan. I do not dwell

on them, because nothing particular grows out of them in the present controversy. By another indenture between the same parties, executed on the 20th of November, 1797, certain other lands were conveyed upon the like trusts. On the 28th of July, 1798, by another indenture General Jackson conveyed certain other lands to Jones and Russell upon like trusts. Neither Mr. Swan nor his wife were parties to this indenture; but by a deed of the 16th of July, 1800, he gave his assent thereto. In this last indenture are contained the estate called the Greenleaf estate, now the Washington Gardens, and also the Mount Vernon Lands, so called, in Boston.

Mrs. Swan, pursuant to her power of appointment during her life-time, made sundry conveyances of the real estates above mentioned, upon like trusts, for her separate use, which lands, by intermediate conveyances, came to the trustee, William Sullivan; and by an indenture of three parts, made on the 30th of March, 1825, between the said William Sullivan of the first part, Jonathan Amory, Richard Sullivan and James Sullivan of the second part, and James Swan of the third part, the same estates were conveyed to the said parties of the second part, upon like trusts, and for the purpose of enabling Mrs. Swan to execute an appointment thereof, in the nature of a last will and testament. On the 25th of April of the same year, another indenture was made between the trustee, William Sullivan, of the one part, Peter O. Thacher and James Sullivan of the second part, and James Swan of the third part, whereby certain personal estate, then in the hands of the said William Sullivan, belonging to Mrs. Swan, and for her separate use, was conveyed to the parties of the second part, for the separate use of Mrs. Swan, and to enable her to dispose of the same in her life-time, and afterwards by deed or by writing, purporting to be her last will and testament, to appoint, direct and dispose of the same. There was a supplementary agreement of the same date, between the same parties, containing further provisions respecting future personal estate which might accrue to Mrs. Swan, and the investments of the property already assigned by the preceding indenture.

Mrs. Swan, in pursuance of these several indentures, made a certain instrument, purporting to be her last will and testament, dated the 29th of April, 1825, and thereby executed, in the fullest manner, her powers of appointment over the real and personal property, which passed under all the indentures above mentioned. By this testamentary instrument she bequeathed the whole of her real and personal estate to William Sullivan, Harrison Gray Otis and William Foster Otis, whom she also made her executors, in trust, to pay certain legacies and annuities, and to distribute the residue among her three daughters, with the usual powers of sale, etc.

Mrs. Swan died in August, 1825; and this testamentary instrument has never yet been proved and allowed in any probate court in Massachusetts; and the executors have not as yet applied for probate or taken upon themselves the discharge of the trusts therein contained. It is further alleged, in the answer of William Sullivan, that James Swan assented to the making of the same testamentary instrument, when the same was made, and since the decease of Mrs. Swan he has also assented to the same, and accepted the provision therein made for his benefit.

There is no proof, in the answers, what was the true origin of the various settlements above stated. The trustees do not undertake to state them, expressing their own ignorance of the subject. At the same time, two of them

assert that Mrs. Swan originally possessed by devise, from a Mr. Dennie, an estate, real and personal, beyond the amount of that included in all the settlements, which was received by Mr. Swan, and lost in his commercial enterprises; that he subsequently relieved his fortune and became possessed of great wealth; and that, if these settlements were made out of his property, they were made as a compensation for the property of his wife so received and lost by him, upon the plain principles of equity and justice. Now, upon this summary exposition of the facts, stated in the answers, the question arises, whether these post-nuptial settlements are, or are not, valid in point of law. If valid, their importance in the future inquiries in this cause will presently be seen.

§ 373. *The post-nuptial settlements held valid ones within familiar rules.*

Upon any view which I am able to take of the facts now before the court, and it is upon these facts only that I am permitted to judge, there does not seem the slightest ground to impeach these settlements, or any of them. Nothing is more clear, both upon principle and authority, than that a post-nuptial settlement, made by a stranger upon a wife, is good and operative in point of law, unless it is dissented from by the husband. And in this case we have the assent of the husband, expressed in the most formal manner, by becoming a party to most of the instruments and by yielding his positive assent in all other cases. If, therefore, these settlements were made out of their own property by strangers, for the benefit of Mrs. Swan, they are incontrovertibly good. And certainly the court cannot judicially say that such was not the real posture of the case. There is nothing by which the court is at liberty to say that the property so secured and settled was derived from Mr. Swan. I may conjecture that it was so, or might have been so, if I were at liberty to deal with conjectures upon subjects of such grave importance. But the law has wisely prohibited any latitude of this sort. The court must deal only with facts, standing upon the face of the record. And after thirty years, when many of the parties are dead, in an examination of persons not originally connected in privity with these settlements, it would be the extreme of rashness to adventure upon such perilous presumptions.

But, supposing the property so settled were derived from Mr. Swan, it by no means follows that these settlements are open to impeachment on that account. It is common learning that a post-nuptial settlement may be made for a valuable consideration by a husband upon and for the benefit of his wife. And even a voluntary settlement, without such valuable consideration to support it, would be upheld if the husband were not in debt at the time, or the settlement were not disproportionate to his means, taking into view his debts and his situation. In short, if the settlement were *bona fide*, reasonable and clear of any intent, actual or constructive, to defraud creditors, it would be valid. I do not pretend to cite the cases on this subject. The doctrine will be found stated, with admirable clearness and accuracy, in the excellent commentaries of Mr. Chancellor Kent (2 Kent's Com., 145), and in the treatises of Mr. Atherley on marriage settlements (ch. 11, pp. 155, 175, 176), and Mr. Roper on the law of property between husband and wife (ch. 8, § 2, pp. 301, 304, 306, 307, 309, etc.). The subject is also very amply discussed in *Reade v. Livingston*, 3 Johns. Ch., 481, and *Sexton v. Wheaton*, 8 Wheat., 229. See *Battersbee v. Farrington*, 1 Swanst., 106; *Kidney v. Coussmaker*, 12 Ves., 136. It is less necessary to dwell on this point because the counsel for the plaintiff have, with great frankness and propriety, admitted the general law on this subject,

and also that they are not able to persuade themselves, upon the facts stated, that enough appears to entitle the court to overturn these settlements. This appears to me a conclusion altogether irresistible.

The same observations apply with equal, nay, with increased force to the devises to Mrs. Swan, in Gen. Jackson's will in 1809; for all these devises expressly refer to the antecedent settlements, and give the whole property upon similar trusts. It appears to me, that his will is sufficiently certain in every particular necessary to give effect to the devise and establish the trusts. *Id certum est, quod certum reddi potest.* In the construction of wills, courts of law, as well as of equity, grant a most favorable consideration to the intentions of the testator, and will give them form and efficiency, so far as they may consistently with principle, however imperfectly such intentions may, in a technical sense, be brought forth and embodied.

§ 374. *In a post-nuptial settlement the provision for successive trusts and new appointments is unnecessary, for the law silently annexes such rights.*

But it is argued that, however good these post-nuptial settlements may have been in their origin, yet if they have since been abandoned or extinguished in point of law, the property thereby secured falls with them, and reverts to the power and use of the husband, and is attachable by his creditors. In support of this proposition, it is said that the original power of appointment secured by them to Mrs. Swan, did not authorize her to create new estates upon new trusts, with powers of appointment reserved to herself *toties quoties*; and that, when once she had exercised her original power of appointment, it was gone forever, and no reservations in the instruments so executing it, of new powers of appointment, were valid; in short, that such successive powers and trusts were void unless provided for in the original post-nuptial settlements.

Now, if the argument itself were well founded in point of law, that no such new powers of appointment could be successively exercised unless provided for in the original settlements, yet the consequence deduced therefrom would not follow. In a court of equity it is impossible that an instrument, affecting to execute a power of appointment, but disappointed in all its objects and intentions, would be held a valid execution of the power. If the estates appointed cannot be created and possess life, as the appointer intends and provides; if the estates are created as trusts and not as beneficial estates, and yet cannot prevail except as absolute, beneficial estates, under the power, the true manner in which a court of equity would contemplate them would be as mere nullities and void executions of the power. It would certainly not create beneficial estates in the appointees, where none were intended, or make those interests absolute which were expressly declared to be conditional. It would, on the other hand, hold that the power of appointment was not well executed, because the manner of execution was beyond and exceeding the power.

But it appears to me that the argument itself proceeds on a false foundation. This is not the case of a power limited in its effect and means, and bound to precise estates and purposes. The power of appointment in Mrs. Swan in all these settlements is contemplated as absolute, covering the whole title and interest in all the property, without control or condition. Now, no position is more clear than that he who possesses the whole power of disposal may exercise it partially. The absolute owner may part with the whole or part of his rights, upon conditions or limitations, for beneficial or for fiduciary

interests. This principle results from the very nature of absolute ownership over property, and, of course, includes all modifications short of an absolute disposition of the whole interest. To entitle Mrs. Swan to dispose of her separate property under these settlements, upon new trusts and new appointments, it was not necessary to provide, in the original settlements, for such successive trusts and appointments. The law silently annexes such rights, as of course, to the general dominion and absolute ownership, reserved by those settlements to her, over the property as her own separate property. In either view, then, the argument is unmaintainable. See *Jaques v. Methodist Church*, 3 Johns. Ch., 543; 17 Johns., 548.

§ 375. *The separate property of a married woman, secured to her or given to her separate use, will be upheld for her use and protected from attachment for debts of her husband.*

In the next place it is argued that, however valid may have been the original settlements or subsequent trusts, still the moment the proceeds or income arising from the property so secured were paid by the trustees into the hands of Mrs. Swan, they ceased to be trust funds, and were immediately liable to attachment as her husband's property, in the same manner as if they had been her property not secured by trusts. This proposition is utterly untenable in a court of equity. It involves, in effect, a total defeat of the original trusts. These trusts were to secure the income and proceeds to the sole and separate use of Mrs. Swan, with an unlimited power to dispose of them as a *feme sole*. Nothing is more clear than that the separate property of a *feme covert*, secured or given to her separate use, will be upheld for her use by a court of equity. Into whose ever hands the same may come, whether of a stranger or even of the husband, if it comes clothed with the trust and with notice of it, the party so possessing it becomes a trustee for the *feme covert*. It is in no sense the property of the husband, and can never become his except by a voluntary appropriation of it to his use by the wife herself. She may invest it as she pleases, and appropriate it to furniture or pictures, or plates or jewelry, or bank stock or other securities, or personal ornaments or paraphernalia, still it is her own, and cannot be touched while she retains her power and dominion over it. For these principles I do not cite particular authorities. They are spread everywhere over the doctrines on this subject, which have been long entertained by courts of equity, and are now generally considered as incontrovertible. Indeed the moment courts of equity decided that *femes covert* could hold separate property to their own use as *femes sole*, it was a necessary consequence that the protection of it should be as universal as the right. The principle is not even confined to cases where trustees are appointed to preserve the trust; but it extends to cases where no trustees are interposed, and yet the nature of the property, or the express provisions of the donation, direct it to be for the separate use of the wife. Even the husband himself will, in such cases, be adjudged a trustee for the benefit of his wife. See *Bennett v. Davis*, 2 P. Wms., 316; *Fettiplace v. Gorges*, 3 Bro. Ch. R., 7; S. C., 1 Ves. Jr., 46; *Rich v. Corhell*, 9 Ves., 369; 1 Thomas, Co. Litt., 132, note N.; 3 Thomas, Co. Litt., 309, note O.; *id.*, 314, note R.; *Atherley on Marriage Settlements*, ch. 21, p. 330; ch. 22, p. 334; 1 Madd. Ch. Prac., 376; 2 Roper, Husband & Wife, ch. 19, pp. 179, 184, 185, 226, 227; *id.*, ch. 17, § 3, b. 140, 143; *id.*, ch. 18, p. 151; *Jaques v. Methodist Episcopal Church*, 3 Johns. Ch., 543; S. C., 17 Johns., 548; 2 Kent's Com., 136, etc.

§ 376. *If there is a power of appointment in a post-nuptial settlement, and the wife, living apart from her husband, dies, the furniture, books, silver plate, etc., of her house will be presumed to be hers.*

In the next place, it is argued that the personal property in the possession of Mrs. Swan at the time of her decease is to be deemed her husband's; and especially the furniture, books, silver plate and pictures, which are stated in the answers. Now that depends altogether upon the question whether these were her own separate property at that time, either by original purchase from her own separate property or as proceeds of her original property, or by any other equitable title as against her husband. For if they were, they are not liable to attachment as her husband's property, but must pass according to her own appointment and disposition of them.

We are, therefore, necessarily led to the inquiry whether the furniture, books, silver plate and pictures above mentioned are the separate property of Mrs. Swan. It is said that *prima facie* these ought to be presumed to be the property of the husband, because found in his family, and he, being a man of fortune in 1796, might well be presumed to have purchased them as a part of his family establishment. Such a presumption might arise under ordinary circumstances. But there are various circumstances in the present case which repel the inferences deducible from the ordinary relation of husband and wife.

In the first place, Mr. Swan left America in 1798, and has never since returned. His absence abroad was voluntary until the year 1808; and it has since that period been compulsive, he having been during all the intermediate time in prison in France, under an arrest by civil process, and as we are given to understand, upon an execution for debts. During the whole of this period (except during a visit of his wife to France in 1804), he has left the whole of his family under the control and management of Mrs. Swan, who has maintained them out of her separate property; and Mr. Swan has never at any time interfered with the furniture, books, plate or pictures which were in her possession. For a considerable part of this period, almost for twenty years, he has been a distressed man, not without means indeed, but embarrassed and in difficulties; and Mrs. Swan has advanced him out of her separate property, not as a gift, but as a debt or loan, between thirty and forty thousand dollars.

In the next place, none of the furniture has been traced back to a period antecedent to the settlement in 1796, and from the facts in the case it is most apparent that a great portion of the old furniture was sold by Mrs. Swan, and new furniture purchased by her on her occasional changes of residence, and to furnish her new houses. No means are pretended for such purchases, except out of her separate property; and if so purchased, it remains her sole property. The two iron bedsteads referred to in the supplementary answer of Mrs. Howard are the only articles of furniture now remaining which are known to have been in existence in 1796; and these are now in the Dorchester house, where they were in that year. They have never been taken into possession by any of the parties now before the court, except as property supposed to belong to Mrs. Swan, and to be disposed of by her will, and shut up for preservation.

In the third place, Mrs. Swan remained in the possession of all the furniture, plate, books and pictures, claiming the same as her own separate property, and exercising all sorts of acts of ownership over them by sale and otherwise, without any intervention of her husband, from the time of her husband's departure from America, in 1798, until her death, in 1825, a period of

twenty-seven years. Such a possession, so notorious and open, under circumstances like the present, furnishes a very strong presumption of right on her part. See *Gore v. Knight*, 2 Vern., 535. In common cases of persons not under coverture, it would afford an irresistible presumption of right. This presumption of right and acquiescence on the part of Mr. Swan, up to the period of her death, admits of various corroborative explanations. It may have arisen, if the furniture, plate, books and pictures were in 1796 the property of Mr. Swan, that they were contained in some distinct settlement of the *personal* estate on Mrs. Swan, which has since been lost. Or they may have been subsequently purchased by her of her husband, out of her separate property, to relieve his necessities, and thus, equitably, have vested an exclusive interest in her. Or they may have been taken and held by her as equitable security, with his assent *pro tanto*, for advances made to him. And if since purchased, they may have been purchased by her out of her separate property, and used to grace her residence, as means suited to her own fortune and rank in life. The answers of the trustees embody various explanations of this nature, which are certainly entitled to great weight, though they explicitly state that they are in total ignorance of the general origin and ownership of the property, and the circumstances under which it came to Mrs. Swan; but they, at the same time, express an unequivocal belief that it was the separate property of Mrs. Swan, and did not belong to her husband.

In the fourth place, the recitals in Mrs. Swan's will which have been relied on by the plaintiff's counsel appear to point to this property, and show that she meant to treat it as her separate property, and claim title to it as her own. The words, "whereas I *am* or *may be possessed* of divers chattels, furniture, etc., as of my own separate property, which *are and were intended, and ought to be, subject to my appointment*," etc., do not indicate any doubt as to the title, but are expressive merely of the *status rei*, the understanding of the testatrix and the claim asserted by her.

In the fifth place, as to the plate, there is very strong affirmative proof of the absolute right claimed by her over it for the purpose of sale; and what is not immaterial, it was deposited by her with General Jackson, an intimate friend of herself and her husband, as early as 1802, as her own property, and was then recognized by him "as the property of Mrs. H. C. Swan." It is stated also in Mrs. Howard's answer, that all but a small portion of this plate was obtained, or first known to the family, after 1796; and that even that portion was understood to be family plate which came to Mrs. Swan by inheritance or bequest.

In the last place, the trustees expressly assert that, according to their best knowledge and belief, the whole of this property was not only claimed by Mrs. Swan as her separate property, but was in fact hers so far as they have any means of information. That they claim it as such and not otherwise. That they do not admit any right or title to the same in Mr. Swan. That they admit no privity with him in respect to it; and that they claim title to it under Mrs. Swan's will as beneficiaries, or trustees, or executors, and utterly deny to hold the same in any other character; and that the same will has hitherto been delayed from probate; and the pendency of this and other suits by the plaintiff has prevented the due execution of the will.

Against all this, there is nothing but a post-mortuary claim of Mr. Swan to the plate, books and pictures; for he lays none to the furniture. He never intimated any claim to them until after Mrs. Swan's death, and that claim is

now resisted, on behalf of her devisees and legatees, by the trustees and executors appointed by her will.

§ 377. *In the process of foreign attachment no one can be adjudged a trustee of any debtor who sets up a title and interest adverse to that of the debtor.*

Now upon this posture of the case, it is impossible for the court to adjudge the parties sued in this case to be trustees of all or any part of the property disclosed in the answers, unless it is prepared to pronounce that it ought so to decide in opposition to claims set up by the trustees, not only adverse to, but inconsistent with, any title to the same in Mr. Swan. It has never yet been decided, to my knowledge, that in our process of foreign attachment a person can be adjudged a trustee of any debtor who sets up a title and interest adverse to that of the debtor, and denies his right to any "goods, effects or credits" in his hands. It seems to me utterly inconsistent with the professed objects of the statute, to suppose any such case to be within its contemplation. There must be a privity in contract or interest between the parties, to bring any case within the reach of that statute. How is it possible to say that any goods, effects or credits are *deposited* with, or *intrusted* to, a party by the debtor, when the party has no privity with him, asserts his interest to be under a third person, who holds an adverse interest, and, on his own account and for other uses, has deposited such goods, effects and credits with the supposed trustee? An attempt to push the statute to this extent would trench upon the constitutional right of the parties to the trial by jury in all controversies respecting property; for I know of no cases in which, under this process, any such course had been used and practiced before the adoption of the convention of 1780. Especially, it seems to me, that such a course cannot be contemplated, when all the parties in interest, as *cestuis que trust*, or otherwise, are not before the court, and when, from the nature of the case, different conclusions on the same facts might be legitimately drawn by a court and a jury. If ever such a doctrine shall be engrafted into our local jurisprudence, it will be time enough to consider whether it is the duty of this court to follow it. At present I stand upon the ground that it is not, and, as far as I can read the language, it cannot be established upon any just exposition of the statute. There must be a clear admission of goods, effects or credits, not disputed or controverted by the supposed trustees, before they can be truly said to have them in deposit or trust. How far, indeed, they may be admitted to set up claims in the nature of a set-off against the admitted property and credits of the debtor in their hands, by way of retainer, or satisfaction or security, is quite a different consideration. If, then, the case stopped here, the denials of any property of the debtor being clear, and the facts establishing none but adverse claims and interests, my judgment would at once lead me to pronounce that the supposed trustees are entitled to be discharged.

§ 378. *When trustees are sought to be charged in attachment, and they claim to be trustees by virtue of a will which has never been admitted to probate, they cannot be held liable.*

There is another difficulty in the case, as it is now presented, which forms, in my mind, an insuperable obstacle to the charging of these parties as trustees. Mrs. Swan's will has never yet been admitted to probate; and until that is done, it would seem impracticable to act upon the subject-matter of that instrument. The supposed trustees in this attachment, Harrison G. Otis and William Sullivan, are two of the persons named in that will as trustees and executors of the property devised therein. The other trustee and execu-

tor is not even made a party to the present attachment. Messrs. Otis and Sullivan have not yet accepted the trusts, or taken upon themselves the duties of executors. Their only title to assume either, depends upon the validity of that will, as a legal appointment. And they disclaim having any possession, actual or constructive, of the property, except merely as preparatory to the assumption of their duties under it, when it shall have been duly proved and allowed. Indeed, Mr. Otis has never intermeddled, in the slightest manner, with the property since Mrs. Swan's decease; and all his antecedent interests therein, under prior trusts, were divested by other conveyances made in her life-time.

Now it is familiarly known that in this commonwealth our courts of probate have not only a *general*, but an *exclusive*, jurisdiction over the probate and allowance of all wills, whether they concern real or personal estate. No other court can entertain the question of the validity of a will, directly or indirectly, whether it be a court of law or of equity. Until such probate, no notice can be taken of the instrument, by whomsoever made, as a testamentary paper. If rejected or disallowed by the court of probate, as a will, it is incapable of being set up elsewhere. If allowed and approved by such court, the probate is, as to its validity, conclusive upon every other court sitting within this jurisdiction. Sitting in the circuit court here, I have no right to entertain any question upon the matter; but must wait until it has been litigated and decided in the proper forum. If, therefore, all the proper parties were before the court, and all their interests fully represented, it would be impracticable for this court to move on with the cause until the testamentary instrument of Mrs. Swan had passed the proper probate.

§ 379. *A testamentary instrument made by a feme covert, even though made by way of appointment, in order to be valid must be probated in like manner as a will.*

It has been argued at the bar that this testamentary instrument, being made by a *feme covert*, is not properly and technically a will, but an appointment in the nature of a will. Be it so. It does not change the posture of the difficulty. If it be an appointment, it purports to be so as a *will*; and it must be proved as a *will*; and if it wants validity as a *will*, it is utterly void. It is a mode of executing the power of appointment provided for by the indentures of the 30th of March and the 25th of April, 1825, and must be proved as it purports, that is, as a *will*. If it cannot be so proved, then the whole property remains in the persons to whom it was conveyed in trust by those indentures; and neither of the parties to this attachment have any interest or power inchoate or complete over it. Their possession, if it exists at all, is a possession for other persons, and not for themselves, or for Mrs. Swan. Now, the persons named in these indentures, or either of them, are no parties to the present attachment. Surely their rights and interests cannot be precluded by such an *ex parte* proceeding as the present.

It is perfectly clear from the authorities, that testamentary instruments, executed by *femes covert* for the disposal of their separate property under powers of appointment, are matters, in England, of ecclesiastical jurisdiction, and are to be proved in the ecclesiastical courts, as to personal property (over which alone those courts have jurisdiction), before notice can be taken of them elsewhere. This is abundantly shown in the elementary writers and commentators (1 Madd. Pr. Ch., 372, 373; 1 Thomas, Co. Lit., 132, note N.; 2 Roper, Husband and Wife, ch. 19, § 3, pp. 191, 192. See, also, 2 Kent, Com., 143; *Ross v. Ewer*, 3 Atk., 160); and was acted on in the very recent cases of *Tap-*

penden v. Walsh, 1 Phillemore, 353, and Temple v. Walker, 3 Phillemore, 394. The case of Osgood v. Breed, 12 Mass., 525, so far from impugning this doctrine, as to the jurisdiction of our probate courts over testamentary instruments of this nature, proceeds upon the supposition of its existence, and assigns very satisfactory reasons (p. 533) why the jurisdiction ought to be exercised, and that it is exclusive, both as to real and personal estate.

The non-existence, then, of that probate in the present case (I repeat it), seems to me a fatal defect, which cannot be cured in this suit, and must defeat the attachment, so far as it seeks to charge the parties as trustees of Mr. Swan.

§ 380. *Bequest of annuity by a married woman, whether executors are liable before the will is probated.*

It has been farther argued, that the parties are at all events chargeable as trustees to the extent of the annuity of \$2,000, which, by Mrs. Swan's will, is given to her husband. To this argument various answers have been given, and some, if not all of them, are conclusive against it. In the first place, without a probate of her will, no right to any such legacy can legally attach in him, and her executors cannot be liable therefor until they have taken upon themselves the execution of the office according to the course of our laws. In the next place, an executor cannot be charged as trustee of any person to whom a legacy is bequeathed by his testator; for such a legacy is not "goods, effects or credits," within the meaning of our statute of foreign attachments. So was the decision of the supreme court of this state in Barnes v. Treat, 7 Mass., 271. And for a broader reason of public policy, it has been held by the same court in Brooks v. Cook, 8 Mass., 246, that an administrator is not liable to be holden as a trustee of a creditor of the estate of his intestate; for he derives his authority from the law, and is obliged to execute it according to law. In the next place, if an executor might ordinarily be held as trustee of a legatee, it is far from being certain that he could be so in the present case. The bequest is of an annuity of \$2,000, to be paid in semi-annual payments of \$1,000 to Mr. Swan, during his life, by the executors. It can scarcely be presumed that it was not the intention of the testatrix that this should be a *personal payment* for the personal comfort and maintenance of her husband, and that the annuity itself should be placed beyond the reach of any creditors. To direct a payment to the creditors of Mr. Swan, through the instrumentality of a foreign attachment, would be to defeat the purposes of the will. It would be in effect to declare that the executors should not pay her bounty to her husband; but should pay it to his creditors. If such a course be repugnant to the manifest intention of the will, I do not see how a court of law can intercept the bounty of the testatrix, and give it a new direction. There is an implied trust in the executors to make the payment *personal*, and to retain the money until so paid. And if so, what court can be at liberty to overthrow it?

But if these difficulties could be, as I think they cannot be, overcome, there remain behind other obstacles of no ordinary magnitude.

§ 381. *Property pledged, and on which there is a lien, is not subject to attachment under the trustee process.*

There is, in the first place, the claim or lien upon the furniture, plate, books and pictures, for the advance of \$6,000. If these things could be deemed in any just sense the property of Mr. Swan, as upon the answers I think they cannot, still they are expressly pledged by him in terms perfectly unequivocal and certain to the persons who have made that advance. The doctrine of the

supreme court of this state (as I understand it) is, that property pledged, or under a lien, is not attachable on this process. *Badlam v. Tucker*, 1 Pick., 389. It has been suggested that this point has never been directly decided; and that in the case cited it is a mere *dictum*. It may be so; but it is a *dictum* from a learned judge in a court where the question must often have been presented for decision; and I consider him as speaking not so much to the point as new, but as one perfectly known and settled. But if there were no authority in point, it appears to me that the result is the same upon principle. In case of a pledge, the pledgee has a special property in the pledge, and is not bound to deliver it up until his incumbrance is discharged. And a creditor surely cannot, in this respect, have greater rights than the pledgor himself. The case of a lien is the same in principle. The party is not bound to take the property as his own and thus become a purchaser, and account for the surplus value; nor is he bound to deliver it upon execution, unless his lien is discharged. It would be a violation of his rights and contract to hold otherwise. It would be to create a new contract, and not administer upon that which the parties have made. In a general sense, goods, which are not attachable by the common process, are not attachable by this extraordinary process. There may be special exceptions, such as that in *Clarke v. Brown*, 14 Mass., 271, standing on a peculiar ground; but the general principle is as has been stated. *Maine F. & M. Ins. Co. v. Weeks*, 7 Mass., 488; *Perry v. Coates*, 9 Mass., 537. And goods in pawn cannot be taken in execution for the debt of the pawner at the common law. *Bac. Abr.*, Ex'ors, ch. 4, p. 175; *Badlam v. Tucker*, 1 Pick., 389, 400.

Then, again, if these things belonged to Mr. Swan there would be very strong ground to hold, upon the circumstances, that there was an implied hypothecation of them, as security for the advances made by Mrs. Swan. And, if so, a court of equity would fasten it upon the property, and hold in favor of the wife, and her donees, the claim as valid, as if the advances had been made to a stranger out of the separate property. And what a court of equity would hold, ought, in favor of the parties summoned as trustees, to be now held in their favor. It is expressly asserted in the answers that the advances of Mrs. Swan were not mere bounties to her husband, but were charged as debts against him.

§ 382. *A trustee may, in the foreign attachment process, avail himself of any claims which he has against his principal by way of set-off.*

In the rear of these claims another lien is asserted against these things, if the property belongs to Mr. Swan. I refer to the claim of Mr. Sullivan for \$6,000 for professional and other services, a claim of the justice of which the court, at least, entertains not the slightest doubt. Whether this claim constitutes a lien or not upon the property, or may be asserted as a set-off, or is otherwise equitably to be recognized under this particular process, need not at present be decided. The case of *Allen v. Megguire*, 15 Mass., 490 (see, also, *Jarvis v. Rogers*, 15 Mass., 389, 406, 414), is against any such lien or set-off. But there is a very material qualification upon the doctrine of that case in a later one (*Hathaway v. Russell*, 16 Mass., 473, 476), where the court distinctly held that the trustee may, in a suit of this nature, avail himself of any claims which he has against his principal, and of which he could avail himself by set-off at the trial, or by a set-off of judgments and executions under our statutes; claims for unliquidated damages, for mere torts only, being excepted. There is good sense, equity and convenience in this latter course; but it is not neces-

sary for me, on this occasion, to decide the point, and I cheerfully leave it to those courts which are more familiarly called upon to consider and settle questions of this nature.

In what has been already said, it will be perceived that no distinction has been taken between the two iron bedsteads and the other furniture. This is not an accidental but designed omission. Upon the facts in the case I am unable to distinguish between them and the other articles, as to presumption of title from origin, or use, or possession.

An exception has been taken to the refusal of the trustees to answer certain questions asked of them by the plaintiff; and they have put themselves to the court upon their rights and duty in these particulars. Those questions go altogether to details, which respect the separate property of Mrs. Swan. The trustees have expressly sworn that they possess no property which they do not claim as the trust and separate property of Mrs. Swan; and if so, the plaintiff has no right to inquire further in what manner her separate property has been, from time to time, disposed of. These are *res inter alios acta*.

Such are the conclusions to which my mind, upon deliberate consideration, has arrived, upon the various questions raised at this argument. They admit of much more ample discussion and illustration. But being satisfied that these conclusions are, so far as my judgment goes, entirely decisive of the case, I have thought it my duty not to keep the parties any longer in suspense, when I am relieved from all doubt. It is for the interest of the plaintiff to know, at as early a period as possible, the result of this litigation, that hope deferred may not make the heart sick. And it is fit also, that the persons sued as trustees should not be held in a state in which they can take no step, from uncertainty of right or duty. If I had possessed more leisure, I should probably have dealt more elaborately with some of the topics, and enlarged on some distinctions. As it is, nothing further is left but to pronounce my judgment, that the trustees be discharged with costs.

TRUST COMPANY v. SEDGWICK.

(7 Otto, 304-309. 1877.)

APPEAL from U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—Prior to the 1st of December, 1865, a copartnership existed in the city of New York under the name of J. K. & E. B. Place. They were dealers in groceries. The members of the firm were James K. Place, Ephraim B. Place and James D. Sparkman. The latter was a special partner. Under the law of New York, such partners can put a limited sum at risk, and are liable for nothing beyond it. At the date mentioned this copartnership was dissolved. E. B. Place retired, and a new firm was formed, under the name of J. K. Place & Co. The members were James D. Sparkman and James K. Place. By the terms of the agreement, Sparkman was to contribute capital to the amount of \$200,000 and Place to the amount of \$600,000, and the profits were to be apportioned accordingly. After making due allowance for the payment of all liabilities, the estimated value of Sparkman's interest in the assets of the old firm was \$262,000, of James K. Place's \$227,000, and of E. B. Place's \$168,000. The latter sum E. B. Place had a right to draw out at any time, and he subsequently received the most of it. The debts of the old firm, at the time of the creation of the new one, exclusive of the sum

due E. B. Place, amounted to \$3,850,000. Adding what was to be paid to him, they exceeded \$4,000,000. A part of the assets of the old firm was merchandise on hand, valued in gold at \$996,000. To this was added, to show its value in currency, forty-eight per cent., making an aggregate of \$1,474,000. There was also cash on hand, consisting of balances in the banks with which the firm dealt, to the amount of \$137,000. The other assets were chiefly bills receivable and accounts in favor of the firm. J. K. Place & Co. put no new capital into their concern. They bought the merchandise of the former firm at \$1,474,000, the amount at which it was estimated in currency. This was nearly \$1,000,000 in excess of the aggregate of the sum to which they severally claimed to be entitled out of the assets of that firm. They remained at its place of business, used its books and applied its means in all respects as if that firm still subsisted.

By a deed bearing date on the 30th of November, 1865, James D. Sparkman assigned the leasehold premises here in question to James K. Place. By a like deed, dated on the 1st of December following, Place assigned the same premises to Mary A. Sparkman, the wife of James D. Sparkman. Both these deeds were acknowledged on the 5th and recorded on the 9th of the month last mentioned. The premises were the family residence of Sparkman. At the time of this transaction he settled upon his wife also the horses, carriages and furniture which formed a part of the establishment. He likewise directed his counsel to prepare the proper instrument for settling upon his wife \$40,000 of seven per cent. bonds of the United States, which he had received as his proportion of a larger amount of those securities belonging to the old firm. He afterwards claimed that this settlement had been made. In one of his answers to the bill in this case he said: "That being about to embark as a general partner in the said firm of James K. Place & Co., and being well advanced in years, he was desirous of making, in favor of his wife, Mary A. Sparkman, since deceased, a settlement of a portion of his property; and on or about the 1st day of December, 1865, having paid in his proportion of the capital to be contributed by him to the firm of James K. Place & Co., he directed his counsel to take the proper steps to secure to his said wife from his then existing remaining property, the sum of one hundred thousand dollars (\$100,000) or thereabouts."

What was done touching the property mentioned was the intended realization of this plan. It is not questioned that the several items were worth the amount proposed to be settled. Mary Ann Sparkman died on the 13th of October, 1866. By her will, which bore date on the 20th of July of that year, she gave the income of her estate to her husband, James D. Sparkman, for life, and after his death, the estate to his children. She had no children.

After her death the leasehold premises were sold and conveyed by her executor to John Q. Preble. He paid \$18,196.60 in cash, and gave his bond and mortgage for \$40,000, being the balance of the purchase money.

On the 27th of December, 1867, J. K. Place & Co. failed, and made an assignment to Burrit and Sheffield for the benefit of their creditors. Subsequently both the partners, Place and Sparkman, went into voluntary bankruptcy, and Sedgwick, the complainant, became their assignee under the bankrupt law. He filed this bill in the district court to reach the \$40,000 of government bonds and the proceeds of the leasehold premises and to subject them to his administration. That court decreed in his favor with respect to the bonds, but dismissed the bill as to the real estate. He thereupon appealed

to the circuit court. There the decree of the district court was affirmed as to the bonds and reversed as to the realty. The court decreed, among other things, that the bond and mortgage of Preble should be delivered to the complainant; that the amount due upon them should be paid to him; and that the executor of Mary Ann Sparkman should pay to the complainant, out of the assets of her estate, the sum of \$28,304.89.

This amount was made up of the cash payment received by James T. Sparkman, while executor, from Preble, with interest to the date of the decree, and interest paid to the executor by Preble on his bond and mortgage, with interest upon that also to the same period. The executor thereupon removed the case to this court by appeal. The appeal was limited to the leasehold premises and the money decreed against the executor. None was taken with respect to the bonds of the United States. That subject is not therefore involved in the controversy as it is now before us.

Two questions are presented for our determination: 1. Was the settlement of the leasehold property valid? 2. If not, was the money decree against the executor properly rendered?

§ 383. *Validity of trust considered.*

On the first point we entertain no doubt. The debts of the old firm, as we have shown, were \$3,852,000. The assets, as they appeared on the books, were \$4,509,000. The debts were a sum certain, which grew constantly and largely by the accumulation of interest. How much less than their face the assets were worth does not appear. They were liable to constant depreciation from the failure and insolvency of those from whom they were due. A sudden fall of prices would have produced the same effect as to the merchandise. The cash on hand was less than three per cent. of the amount of the liabilities to be paid. The assets of every kind, good and bad, exceeded the amount of the liabilities to be paid by only two-ninths. He would have been a bold, if not a rash man, who would have agreed to take all the assets and pay all the debts. No responsible person, we apprehend, would have entered into such a stipulation without a large premium in addition to the assets. The new company was embarrassed from the beginning, and failed within a few days over two years from the time it was formed. It was found to be hopelessly insolvent. Its liabilities exceeded its means by at least \$600,000.

With these facts before us, we cannot hesitate to hold that Sparkman was in no condition to settle anything on his wife when the new partnership was formed.

The turning point in this class of cases is always whether there was fraud in fact. The result depends upon the solution of that question. When one engaged or about to engage in any business has the means to meet its usual exigencies, and devotes such means in good faith to the business, and has besides other means which he chooses to settle upon any object of his bounty, unlooked-for disasters on his part, subsequently occurring, will not affect the validity of the settlement, because they afford no ground for the imputation of unfairness. But where there are heavy subsisting liabilities, doubtful solvency, a large settlement made upon the wife at the outset of the business, and failure and insolvency to a large amount shortly follow, it is impossible to avoid the conviction that there was a deliberate plan to provide for the settler and his family in any event, and to throw the burden of the losses that might occur upon his creditors. The intention animating such conduct is condemned alike by ethics and the law. We think the case before us falls within this

category, and we are entirely satisfied with the judgment of the circuit court upon the subject.

But different considerations apply to the fund for which the money part in the decree was rendered. The moneys were received by the executor for property sold by him after the death of the testatrix. It was lent by him to the firm of Place, King & Place, and was lost to the estate by their failure. There is no proof that the testatrix took any part in bringing about the settlement, or that there was any guilty knowledge on her part in the transaction. It is fairly to be presumed that she confided in the good faith of her husband, and simply yielded obedience to his wishes. The provision of her will attests her devotion to him. The fund did not exist in her life-time, and her estate has been in no wise benefited by it. The transfer of the property was his act, not hers. She was only a passive recipient. Her will—doubtless influenced, if not controlled by him—gave him her entire estate for life, and, after his death, gave it to his family. No provision was made for her family.

The sphere of the avocations and duties of husband and wife are different. Usually she knows little of business and property interests. It is natural that she should confide in his integrity, and be guided in everything by his kindly judgment. She is always *sub potestate viri*. Hence, the disabilities and safeguards which the law wisely throws around her.

§ 384. *The wife is not liable for the value of real estate conveyed to her by the husband in fraud of his creditors.*

Chancellor Kent says: "The husband is liable for the torts and frauds of the wife committed during coverture. If committed in his company or by his order, he alone is liable." 2 Com., 149. "And if a wife act in company with her husband in the commission of a felony, other than treason or homicide, it is conclusively presumed that she acted under his coercion and is consequently without any guilty intent." 1 Greenl. Ev., sec. 28. See, also, *Liverpool Adelphi Loan Association v. Fairhirst*, 9 Exch. Rep., 422, and *Gordon v. Haywood*, 2 N. H., 402.

A *feme covert* may be a trustee, but her husband is personally liable for any breach of trust she may commit, and hence she cannot act in the administration of the trust without his concurrence or consent. *Hill, Trustees*, 464; *Phillips v. Richardson*, 4 J. J. Marsh., 212. She is not liable upon the covenants of title in a deed executed by herself and her husband. *Schouler, Dom. Rel.*, 155. Upon the subject of her disabilities, see *Norton v. Meader*, 4 Saw., 603.

This part of the decree was clearly erroneous, and the error must be corrected.

The cases of *Phipps v. Sedgwick* and of *Place v. Sedgwick*, 95 U. S., 3, were branches of this litigation. They presented the same questions of fact and law which we have considered in this case. Those questions were disposed of as we have now determined them. The fullness with which the views of the court, speaking through Mr. Justice Miller, were expressed, renders it unnecessary to add anything to what has been already said on the present occasion.

This case will be remanded to the circuit court, with directions to modify the decree in conformity to this opinion; and it is so ordered.

§ 385. *Statute of frauds.*—The provision of the English statute of frauds, concerning promises made in consideration of marriage, is in force in Georgia, and such promise, not in writing, to settle property upon an intended wife, made before marriage, is void. *Lloyd v. Fulton*, 1 Otto, 470.

§ 386. And such promise after marriage, made without consideration, is also void. *Ibid.*

§ 387. Marriage settlements; ante-nuptial.—Marriage is a valuable consideration. Cases cited. *Prewitt v. Wilson*,* 18 Otto, 22. See § 812.

§ 388. A marriage settlement may be impeached in equity for vice in the consideration or for an attempt to fraudulently interpose it between the debtor contractor and his creditors. *Magniac v. Thomson*, 15 How., 281.

§ 389. Whether the husband has temporarily surrendered his marital rights or abandoned them altogether depends upon the intention of the parties as expressed in the marriage contract. *Marshall v. Beall*,* 6 How., 70.

§ 390. In marriage contracts the husband does not necessarily have an interest in the wife's portion when she has none in his, nor need the survivor have a life estate in the other's portion. Rules stated on which a reformation of marriage articles may be had, and reformation refused under the circumstances shown. *Tilghman v. Tilghman*, Bald., 464.

§ 391. In general, and apart from some trust, the wife's personal property at the time of her marriage vests in the husband and is subjected to his creditors' claims in bankruptcy. Such a trust may be expressly created or implied from the nature of the gift, or from other attendant and conclusive circumstances. *In re Grant*,* 5 Law Rep., 11.

§ 392. Where, under a marriage settlement, a jointure is provided, to be invested at interest on freehold security, or stock of the United States, or bank stock, "with the approbation of" the wife, she has the right of election between the several kinds of investment specified; though this election should not be capriciously or injuriously exercised. *English v. Foxall*,* 2 Pet., 595.

§ 393. A trustee in a marriage settlement, which confers upon him the power to sell the corpus of the trust estate and re-invest the proceeds, is not authorized by section 2327 of the Georgia code, or a decretal order founded on it, to place a mortgage on such trust property. *Patapasco Guano Co. v. Morrison*, 2 Woods, 395.

§ 394. A trustee in a marriage settlement cannot bind the trust estate by a negotiable note secured by an (alleged) mortgage on such estate. *Ibid.*

§ 395. A power vested in the trustees in a marriage settlement to sell the property and re-invest the proceeds in other property subject to the same trust does not include nor imply a power to mortgage. *Ibid.*

§ 396. Where the trustee in a marriage settlement has a power to sell and re-invest the trust property whenever, in his opinion, this may be done with advantage to the beneficiaries, he must exercise that opinion fairly and honestly; otherwise the sale, especially if for an inadequate price, will be set aside. *Wormley v. Wormley*,* 8 Wheat., 421.

§ 397. An executed marriage settlement must be expounded on the legal principles applicable to other deeds. *Adams v. Law*,* 17 How., 417.

§ 398. In considering a marriage settlement, equity will not construe the contract differently from its terms in favor of the parties to the marriage, though doubtless in favor of the issue a liberal construction will be applied. *Tilghman v. Tilghman*, Bald., 464.

§ 399. A marriage settlement settled realty to the use of husband and wife during their natural lives and then to the use of such children as might be procreated between them, and to his, her and their heirs and assigns forever. *Held*, that this remainder was contingent until the birth of a child, and then vested in such child, and opened to let in after-born children, and was therefore unaffected by the act of attainder of 1779. *Carver v. Jackson*,* 4 Pet., 1.

§ 400. The object of a marriage settlement being jointure and not a settlement for the issue of the intended marriage, and a limitation being made to the children of the marriage dependent on the event of the wife's death during her husband's life-time, and the contingency not relating to the leaving issue generally of the marriage, but "leaving issue" of said marriage, "one or more children then living." The word "issue" does not include grandchildren. *Adams v. Law*,* 17 How., 417.

§ 401. Marriage settlement construed which purported to authorize a conveyance of the land whenever "in the opinion of" the trustee it could be done, and the money reinvested "advantageously," etc. *Held*, that the trustee should exercise, not his will, but his judgment, and could only sell and reinvest when, in his opinion, both acts could be advantageously done. *Wormley v. Wormley*, 1 Marsh., 380.

§ 402. Deed of marriage settlement construed, which created a trust to the effect that if the wife should survive the husband, having children, the trustees should stand possessed of the chattels and their increase for the benefit of the widow and children as tenants in common. *Held*, the wife surviving and marrying twice again, the purposes of the trust were fulfilled on the first husband's death, and the legal estate passed to the widow and child of the marriage, as tenants in common. *Hardin v. Patterson*,* 3 N. Y. Leg. Obs., 275, 400.

§ 403. An instrument, of peculiar tenor, given by the wife's father to husband and wife in consideration of a conveyance of the husband's farm to him, construed as making husband and

wife joint tenants; so that the wife having died, also her father, and the husband becoming subsequently bankrupt, his assignee is entitled to the farm, subject to a lien in favor of the father's estate for fulfillment of the stipulations under void instrument. *Atwood v. Kittell*,* 17 N. B. R., 406.

§ 404. A marriage settlement of the intended wife's goods, though not recorded, protects the goods from the husband's creditors. *Pierce v. Turner*, 1 Cr. C. C., 462.

§ 405. The secret settlement by a wife before marriage, without the knowledge of her intended husband, and in derogation of his marital rights, may be avoided by him. *Linker v. Smith*,* 4 Wash., 224.

§ 406. Post-nuptial settlements — Gift from husband to wife, etc. — A post-nuptial contract, on sufficient consideration, partly executed, is valid in equity. *Kesner v. Trigg*, 8 Otto, 50 (Conv., §§ 588-89).

§ 407. A wife may become a creditor of her husband to the extent of her separate money laid out in building a house on her husband's land. But if the husband, when insolvent, conveys the land through B. to his wife, the conveyance should be set aside at the instance of his assignee in bankruptcy, saving the equity of the wife as to the amount she thus laid out. *In re Wood*,* 5 Fed. R., 448.

§ 408. When and under what circumstances a post-nuptial settlement is valid. *Lee v. Hollister*, 5 Fed. R., 757.

§ 409. The settlement of lands upon a wife is valid if the rights of no existing creditors be impaired. *Clark v. Killian*, 18 Otto, 766.

§ 410. A husband, through the intervention of trustees, can make a valid conveyance to his wife, on a *bona fide* consideration out of the wife's estate. *Bank of United States v. Lee*, 13 Pet., 107.

§ 411. Where the husband makes a valid settlement of property upon his wife, which is afterwards by their joint act appropriated to the payment of a particular creditor of the husband, neither the assignee in bankruptcy nor any subsequent creditor of the husband can rightfully complain. *Stewart v. Platt*, 11 Otto, 731 (Conv., §§ 1773-81).

§ 412. Where a husband buys real estate with money belonging to the wife before marriage, and takes the deed directly to her, pursuant to a verbal agreement to that effect made with her before the marriage, his creditors cannot set aside the transaction. *Mechanics' Bank v. Taylor*, 2 Cr. C. C., 507.

§ 413. A conveyance to a married woman in consideration of her promissory note amounts to a gift to her, her note being void. *Dick v. Hamilton*, Deady, 338.

§ 414. But not so, however, if the note should be finally paid out of property of the wife mortgaged to secure the note. *Ibid.*

§ 415. But where such note was paid by money borrowed on the joint note of the husband and wife, the consideration moved from the husband, and the conveyance was a fraud on the creditors of the husband. *Ibid.*

§ 416. Where land is conveyed to a married woman in consideration of a release of dower in other property, the consideration moves from her, and the transaction is valid as against existing or subsequent creditors of the husband. *Ibid.* And see § 544.

§ 417. Property received by a married woman as a gift from her husband is separate property under the constitution of Oregon. *Starr v. Hamilton*, Deady, 279 (§§ 227-31).

§ 418. Where land is purchased by the wife, with money belonging to the husband, the transaction is regarded as a gift, and is valid, if the husband at the time is solvent, and it is not intended at the time to defraud subsequent creditors. *Dick v. Hamilton*, Deady, 328.

§ 419. The Arkansas statute as to gifts made to the wife by the husband during coverture follows the common law rule. And the husband, not having parted with the legal title to bonds, may sue a third person for unlawfully converting them, notwithstanding any equitable gift thereof for his wife's benefit. *Kitchen v. Bedford*, 18 Wall., 418.

§ 420. A conveyance by the husband to a third party, and by the latter to the wife, is to be treated the same as though the husband had conveyed directly to the wife. *In re Brandt*, 5 Biss., 218.

§ 421. Circumstances under which a post-nuptial settlement will be sustained, notwithstanding the statute of Maine (Rev. Stat., ch. 61, § 1). *Wiswell v. Jarvis*, 9 Fed. R., 90.

§ 422. A voluntary post-nuptial settlement upon his wife, made by a husband who is not indebted at the time, is valid against his subsequent creditors. Statute of 18 Elizabeth considered as to previous and subsequent creditors. *Sexton v. Wheaton*,* 8 Wheat., 229.

§ 423. A husband, if solvent and pecuniarily unembarrassed, may make a settlement of property on his wife, if it is not unreasonable in amount, and leaves him still with assets abundant for meeting his existing liabilities. *Sedgwick v. Place*,* 5 N. B. R., 168; 8 Ch. Leg. N., 409.

§ 424. A husband, when free from debt and without contemplating bankruptcy, made a

voluntary settlement of property upon his wife, reserving expressly to himself a power of revocation, in whole or in part, and a power of appointment to any uses or persons he might designate, either by will or deed. He afterwards became bankrupt. *Held*, that his assignee in bankruptcy could not invalidate the settlement. *Jones v. Clifton*, 7 Cent. L. J., 89; 18 N. B. R., 125. See §§ 365-68.

§ 425. When a man is in embarrassed circumstances and insolvent, he cannot make use of his wife, directly or indirectly, to cover up any of his property, or any of his earnings or skill. *In re Eldred*,* 1 Ch. Leg. N., 389.

§ 426. A settlement upon the wife, when the husband is in embarrassed circumstances and pressed by creditors, the amount being unreasonably large under all the circumstances, cannot be supported by testimony that, twenty years before, the wife had advanced him money used in his business, without taking security or written promise or voucher of any kind. *In re Antiedel*,* 18 N. B. R., 289.

§ 427. A decree rendered in a suit by a wife against her husband, by which his former conveyance to her is confirmed, does not debar his assignee in bankruptcy from attacking the conveyance as fraudulent upon creditors. *Humes v. Scruggs*,* 4 Otto, 22.

§ 428. If the money which a married woman might have had secured to her own use is allowed to go into the business of her husband and be mixed with his property, and is applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in his business, and is then used for a series of years, there being no specific agreement when the same is purchased that such real estate shall be the property of the wife, the same becomes the property of the husband for the purpose of paying his debts. He cannot retain it until bankruptcy occurs and then convey it to his wife; such conveyance is in fraud of the just claims of the creditors of the husband. *Ibid*.

§ 429. Taking out securities in the wife's name cannot overcome such conduct on the part of both husband and wife as defrauds his creditors by leading them to think that no settlement existed. *In re Jones*,* 6 Biss., 68.

§ 430. A post-nuptial settlement, out of proportion to the means of the husband, is constructively fraudulent. *Kehr v. Smith*, 20 Wall., 31 (§ 580).

§ 431. In order to defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do supervene; the settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable. *Per Mr. Justice Swayne. Smith v. Vodges*,* 2 Otto, 183.

§ 432. Insolvency need not be shown or presumed to avoid a post-nuptial settlement; and such a conveyance of voluntary settlement to wife and children of a large amount of property by a merchant doing business largely on credit, with scattered and uncertain assets, overestimated in value, is void as against creditors, both under the common law and the Alabama statute of fraudulent conveyances. *Parish v. Murphree*, 13 How., 92.

§ 433. Prior indebtedness of the husband, settling property in trust for the use of his wife, is only presumptive and not conclusive evidence of fraud, and this presumption may be explained and rebutted; and where, in Georgia, such a conveyance was made, and it appeared that the debtor had at the time reserved enough to pay his debts, and their non-payment afterwards was due, not to fraud, but to accident and misfortune, the conveyance was sustained. *Lloyd v. Fulton*, 1 Otto, 435.

§ 434. No proceedings for litigating the rights of parties, independently of the assignee's petition for property alleged to be in the hands of the bankrupt, are necessary where a pretended gift of furniture by the insolvent husband to his wife was accompanied by no visible change of possession, and was only verbally made. *In re Pierce*, 7 Biss., 426.

§ 435. Where property is conveyed to a wife in fraud of her husband's creditors, a personal judgment for its value after its alienation cannot be rendered against her, or after her death against her executors. *Phipps v. Sedgwick*, 5 Otto, 3. See § 330.

§ 436. Joint possession by husband and wife of the latter's household chattels is no badge of fraud. *Bank of United States v. Lee*,* 5 Cr. C. C., 319.

§ 437. In equity the husband may make gifts of personal ornaments or jewelry to his wife for her sole and separate use. The gift will be good against his personal representative in case of his death, being solvent; but not against his own power to reclaim during his life, nor against the rights of his creditors in bankruptcy. But mourning rings given by third persons to the wife since marriage are purely personal, and cannot be touched either by the husband or his creditors. *In re Grant*,* 5 Law Rep., 11.

§ 438. Joint purchase by spouses.—Where real estate was purchased from the joint earnings of husband and wife, and the title taken in the name of the wife alone, an equity by way of trust attaches for the benefit of the husband. *Jackson v. Jackson*,* 1 MacArth., 84.

§ 439. Gift from wife to husband.—Circumstances under which property devised and bequeathed to a wife, and held in trust for her by executors, did not inure to the husband as a gift from the wife, though transferred to him by the executors. Wife's claim against the husband's estate in bankruptcy allowed accordingly. *In re Corse*,* 2 Fed. R., 307.

5. Dower and Curtesy; Surviving Spouse.

SUMMARY — *Tenancy by the curtesy*, §§ 440-445.—*Widow's dower, its nature*, §§ 446-453, 457, 458; *how barred*, §§ 458-461; *how assigned*, §§ 450-452; *how released*, §§ 451, 462-464.

§ 440. As to curtesy in wild lands, actual seizin of wife is not essential, but seizin in law will suffice. *Davis v. Mason*, §§ 465-69.

§ 441. The husband may in equity have curtesy of a use or trust as well as of a legal estate. *Ibid.*

§ 442. In Rhode Island a husband is not entitled to an estate by the curtesy in lands of which his wife has no actual seizin, but only an expectant fee in reversion. *Stoddard v. Gibbs*, § 470.

§ 443. Law of tenancy by the curtesy reviewed; and held that, under the common law of curtesy, seizin during coverture must be shown, in order to entitle the husband to claim as tenant by the curtesy. *Barr v. Galloway*, §§ 471-76.

§ 444. Entry on wild lands, which would be vain or impracticable, is not necessary to enable a husband to take as tenant by the curtesy. *Ibid.*

§ 445. What is the interest of a husband in his wife's lands at common law and by the Tennessee code, providing that such interest should not, during her life, be sold or disposed of by virtue of any judgment, etc.; and rule applied, where the wife was seized of lands when the husband became bankrupt, there being issue of the marriage, and afterwards died pending bankruptcy proceedings, so as to permit the assignee to take the land for the remainder of the husband's life. *In re McKenna*, §§ 477-79.

§ 446. In Maryland, prior to the statute of 1823, joint tenancies existed; and to land held in joint tenancy, dower does not attach. *Mayburry v. Brien*, §§ 480-83.

§ 447. Where a conveyance and a mortgage back are delivered at the same time, no right of dower attaches to the mortgagor's momentary seizin of the land. *Ibid.*

§ 448. Before the statute of 1818, dower could not, in Maryland, attach to an equity of redemption. *Ibid.* And see *Stelle v. Carroll*, § 503.

§ 449. Dower is not allowable to the wife of an estate of which her husband is trustee only. *Powell v. Monson & Brimfield Manufacturing Co.*, §§ 484-87.

§ 450. Valuation and the time of computing it when assignment of dower is made after improvement by the purchaser. *Ibid.*

§ 451. A mortgage is not an absolute alienation of an estate so as to debar dower, where the wife did not join. *Powell v. Monson & Brimfield Manufacturing Co.*, §§ 488-90.

§ 452. A widow is entitled to dower in improvements made upon her husband's property, although mortgaged, except where made by the purchaser after alienation. *Ibid.*

§ 453. The statute of Westminster II, which makes adulterous elopement of the wife a bar to dower, is not in force in Iowa. *Smith v. Woodworth*, §§ 491-92.

§ 454. A verbal contract, in lieu of dower, between husband and wife, is insufficient at law to bar her dower. *Ibid.*

§ 455. Concurrent jurisdiction of equity and law in the assignment of dower, upheld. *Herbert v. Wren*, §§ 498-95.

§ 456. If a devise of land in Virginia to the widow appear from the circumstances to be intended in lieu of dower, she must make her election and cannot take both. *Ibid.*

§ 457. Where a wife joins her husband in a lease for years, she is still entitled to dower in the rent. *Ibid.*

§ 458. Dower is a legal right not to be divested except upon the widow's full knowledge of her rights. *United States v. Duncan*, §§ 496-99.

§ 459. Returning part of the estate which the wife had in her own right is not in lieu of dower. *Ibid.*

§ 460. To bar dower under the Illinois statute, which must be reasonably construed, a legacy of personal property must be such as to afford a reasonable presumption that it was intended in lieu of dower. *Ibid.*

§ 461. A widow will not be held to have renounced her dower before an opportunity to ascertain facts enabling her to make election. *Ibid.*

§ 462. Under Massachusetts law an instrument executed by the wife long after the principal deed of her husband, and expressed: "I agree in the above conveyance," does not amount to

a release of her dower. Words significant of the intention to release dower must be used. *Hall v. Savage*, § 500. And see *Powell v. Monson Manufacturing Co.*, § 484.

§ 463. Under the laws of Maryland and the District of Columbia, a wife, by acknowledgment of a mortgage under privy examination, passes the legal estate and is debarred of dower; and she cannot claim dower out of the equity of redemption left in the husband, as against a junior mortgagee paying off the senior mortgage. *Stelle v. Carroll*, §§ 501-503.

§ 464. The act of Minnesota of 1857, validating conveyances of land "whether heretofore or hereafter" made, under a joint power of attorney from husband and wife, held to cure a conveyance of that character, so as to cut off dower of the wife. The right of dower, being inchoate and contingent until the death of the husband, is, until that event, under the control of the legislature. *Randall v. Kreiger*, §§ 504, 505.

[NOTE.—See §§ 506-557.]

DAVIS v. MASON.

(1 Peters, 508-510. 1828.)

ERROR to U. S. Circuit Court, District of Kentucky.

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—The plaintiffs here were defendants below to an action of ejectment brought to recover eight thousand acres of land lying in the state of Kentucky.

The law of real estates in Kentucky, therefore, is the law of this court, in deciding on the rights of the parties. The plaintiffs below derive title under, 1. A patent to George Mason, of Gunston, issued in 1787. 2. A deed of bargain and sale from seven out of nine legal representatives of the patentee, their brother, to George Mason, of Lexington, executed in 1794. 3. A codicil to the will of George Mason, of Lexington, devising the premises to the lessor of the plaintiffs. Judgment was rendered for plaintiffs to recover eight-ninths of the premises. The defendants below relied on their possession, affecting to claim through the patent to the elder Mason, but adducing no evidence to connect themselves with it. The questions to be here decided are brought up by a bill of exceptions, taken by the defendants below, and they will be considered, as they regard the deduction of title, in the order in which they have been stated above.

The first question in this order relates to the deed executed by the representatives of Mason the elder to Mason the younger, under whose will the lessor of the plaintiffs makes title. No exception was taken to the proof upon which this deed went to the jury. The exceptions go to the nature and extent of the estate which passed under it. And first, it was insisted that it could pass nothing, unless the plaintiffs should show that the land sued for was entered after George Mason, senior, made his will, and not patented at his death; on the ground that, otherwise, it passed under his will, and did not descend to these donors. But it is obvious that this instruction was properly refused, since the fact nowhere appears in the record that the elder Mason ever made a will competent in law to transfer real estate. The deed, it is true, purports to carry into effect his intentions towards his children; but *non constat*, whether that intention had ever been signified otherwise than by parol or by an informal will. If a will had ever been executed with the formalities necessary to defeat the heir at law, the defendants should have availed themselves of it by proof.

The next instruction prayed for by the defendants and rejected by the court was, "that if from the evidence the jury believed that the daughters of the patentee were dead before the suit was brought, that then they ought to find for defendants, as to the undivided interest of such daughters, and that the

deed did not pass their interest. The court instructed the jury that the deed did not pass the interest of the daughters, but passed the interest of their husbands, who were tenants by curtesy, although they had never had other or further possession of the land than what they acquired by deed.

To understand this part of the bill of exceptions, it is necessary to notice that, from the record, it appears that among the parties of the first part to the deed to G. Mason the younger were four daughters of G. Mason the elder, and their husbands; that the daughters had formally executed a release of inheritance under a commission issued from a court in Virginia, but, because the states were then separated, as a judicial proceeding, it had no validity as to lands in Kentucky, and the lessor of the plaintiffs was compelled to stand upon the interest conveyed to him by the deeds of the husbands as tenants by the curtesy.

§ 465. *Evidence; proof of pedigree.*

In order to prove the pedigree of the donors, the marriage, birth of issue, etc., and of the sons-in-law of the elder Mason, the testimony of two witnesses was introduced by plaintiffs, taken under the act of congress. To the introduction of this testimony an objection was made and overruled and this constituted another ground of exception, which, however, has been very properly waived by the counsel in argument here. It appears that the requisitions of the act have been well complied with.

§ 466. *Curtesy in wild lands; actual seizin of wife not essential; seizin in law sufficient.*

This testimony, besides establishing the pedigree, marriage and birth of issue, etc., of the husbands and their wives, and identity of the lessor of the plaintiffs, as devisees of G. Mason the younger, also goes to prove the death of some, if not of all, the daughters; and the exception is intended to raise the question whether, in the absence of evidence of actual seizin, the husbands had good estates as tenants by the curtesy in the portions of the land belonging to their respective wives; if they had not, then by the death of their wives their estates were determined. To repel this objection to the vesting of the estate by the curtesy evidence is introduced into the bill of exceptions to prove that "the adverse possession of the premises, relied on by the defendants, did not commence until after the execution of the deed, and after the death of George Mason; in other words, that the land was waste, or, as is sometimes styled, wild lands," at the time of executing the deed, and at all times before and down to the time of the devise from George Mason, Jr., to the lessors of the plaintiff took effect.

It is believed that the rigid rules of the common law have never been applied to a wife's estate in lands of this description. In the state of New York (8 Johns., 271), these rules have been solemnly repelled; and we know of no adjudged case in any of the states in which they have been recognized as applicable. It would, indeed, be idle to compel an heir or purchaser to find his way through pathless deserts into lands still overrun by the aborigines in order to "break a twig," or "turn a sod," or "read a deed," before he could acquire a legal freehold. It may be very safely asserted that had a similar state of things existed in England when the conqueror introduced this tenure, the necessity of actual seizin, as an incident to the husband's right, would never have found its way across the channel.

It is true that Perkins and Littleton and other authors of high antiquity and great authority lay down the necessity of actual seizin in very strong

terms, and exemplify it by cases which strikingly illustrate the doctrine. But even they do not represent it as so unbending as to be uncontrolled by reason.

The distinction is taken between things which lie in livery and things which lie in grant; and with regard to the latter, the seizin in law is enough, because they admit of no other; and, as Lord Coke observes, "the books say it would be unreasonable the husband should suffer for what no industry of his could prevent;" and further, "that the true reason is that the wife has those inheritances which lie in grant and not in livery when the right first descends upon her, for she hath a thing in grant when she has a right to it and nobody else interposes to prevent it." And in another place he says, "a husband shall be tenant by curtesy, in respect of his wife's seizin in law, where it was impossible for him to get an actual seizin;" for "the favor which the law shows to the husband that has issue by his wife shall not be lost without some default in him." So when describing what is livery of seizin, and defining the distinction between livery and deed and livery in law, he says of the latter, "if the feoffee claims the land as near as he dares to approach it for fear of death or battery, such entry in law shall execute the livery in law."

And as a proof that even in his time the common law had begun to untrammel itself of the rigorous rule that livery of seizin or entry was indispensable to vesting a freehold, the fact may be cited that livery of seizin was held unnecessary to a fine, devise, surrender, release or confirmation to lessee for years. The mode of conveyance by lease and release and some other modes, it is well known, arose out of an effort to disembarass the transfer of titles of an idle form which had survived the feudal system.

As it relates to the tenure by courtesy the necessity of entry grew out of the rule which invariably existed, that an entry must be made in order to vest a freehold (Co. Lit., 51), and out of that member of the definition of the tenure by curtesy, which requires that it should be inheritable by the issue. When a descent was cast, the entry of the mother was necessary, or the heir made title direct from the grandfather or other person last seized. But in Kentucky, we understand, the livery of seizin is unheard of. Freeholds are acquired by patent, or by deed, or by descent without any further ceremonies; and in tracing pedigree the proof of entry, as successive descents are cast, is never considered as necessary to a recovery or in any mode affecting the course of descent.

If a right of entry, therefore, exists, it ought, by analogy, to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists; as it is laid down in the books relative to a seizin in law, "he has the thing, if he has a right to have it." Such was not the ancient law; but the reason of it has ceased. It has been shown that, in the most remote periods, exceptions had been introduced on the same ground; and in the most modern the rule has been relaxed upon the same consideration. We ought not to be behind the British courts in the liberality of our views on the subject of this tenure.

§ 467. *Husband may have curtesy of a use or trust.*

A husband, formerly, could not have curtesy of an use; that is, where his wife was *cestui que use* (Perkins' Curtesy, fo. 89), and this continued to be the law down to the time of Baron Gilbert. Law of Uses and Trusts, 239. At present, it is fully settled in equity that the husband shall have curtesy of a trust, as well as of a legal estate (2 Vern., 536; 1 P. Wms., 108; 1 Atk.,

606); of an equity of redemption, a contingent use; or money to be laid out in lands.

The case made out in the bill of exceptions is one in which there could not possibly have been any default in the husbands, since the disseizin by defendants did not take place until after the death of George Mason, Jr., and of consequence after the transfer of title by the husbands, and after the devise took effect in favor of the plaintiffs' lessor.

These points being disposed of, it only remains to consider the questions raised upon the introduction of the will of George Mason, Jr., or rather of the codicil, under which the lessor of the plaintiffs makes title. Under a law of the state of Kentucky, and the decision of their courts upon it, a will with two witnesses is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will. The objection here is, that it does not appear from the exemplified copy that this codicil was duly proved; because the probate does not go to that codicil, but to another; and, secondly, because it appears to have been admitted to record on the testimony of a single witness.

§ 468. *A first and second codicil may be considered as but one, where only the latter is signed.*

The probate purports "that the two codicils were proved by the oath of Daniel M'Carty." From the exemplification, it appears that at three several dates the testator added to his will what he calls codicils; but as there is no signature to the first, we are satisfied that the first and second were well considered as making but one; and, therefore, that the probate, although purporting to go to two codicils only, was well considered as going to this; which, but for the want of the signature to the first, would have been the third codicil. What is decisive on this subject is, that the first two codicils have no subscribing witness distinct from the last; and the name of M'Carty, the witness sworn, is subscribed to the second, or, as the defendants contend it should be considered, to the third codicil.

§ 469. *Where two witnesses are required to subscribe an instrument, the evidence of one is sufficient to prove it.*

With regard to the second exception to the sufficiency of the proof of this codicil, it can only be necessary to resort to adjudged cases, as they seem conclusive to this point. There were two witnesses to this codicil, to wit, Thompson Mason and M'Carty. M'Carty only was sworn, and the probate upon which it was ordered to be recorded imports that the two codicils were proved by the oath of Daniel M'Carty. In the case of *Harper et al. v. Wilson et al.*, decided in the court of appeals of the state of Kentucky, in 1820 (2 A. K. Marsh., 465), in which the right to lands was in controversy, the probate was in these words: "This will was produced in court, proved by the oath of Sarah Harper, a subscribing witness thereto, and ordered to be recorded." There was another subscribing witness to the will, and exception was taken to the sufficiency of the proof. The language of the court in that case was: "As to the proof of the execution of the will, it need only be remarked that its admission to record is sufficient to show that the witness, by whom it was proven in that court, established every fact essential to its due execution; and it is a settled rule, that, although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it." 2 Marshall, 467. The same doctrine has been since fully recognized in the case

of *Turner v. Turner*, 1 Litt. Rep., 103, adjudged in the same court in 1822; and the identity of the certificate and facts in this case with those in the case of *Harper v. Wilson* leaves nothing for this court to deliberate upon.

There is spread upon the record a considerable body of testimony, taken by the court, by which the will had been previously admitted to record, and which, upon the face of it, appears to have been taken in order to remove all doubt on the sufficiency of the will and authenticity of the attestations to it. But as it does not appear to have been followed up by any order of that court, it was not taken into view in the bill of exceptions, and made no part of the evidence in the court below. It therefore only required this remark in order to prevent any misapprehension on this point.

We are of opinion that there was no error in the judgment below, and that it be affirmed, with costs.

STODDARD v. GIBBS.

(Circuit Court for Rhode Island: 1 Sumner, 268-275. 1832.)

Opinion by STORY, J.

STATEMENT OF FACTS.—There is but a single question in this case, and that is, whether in Rhode Island a husband is entitled to a life estate, as tenant by the curtesy, of land of which his wife was in her life-time seized in fee in reversion.

§ 470. *In Rhode Island a husband is not entitled to an estate by the curtesy in lands of which his wife has only a fee in reversion.*

If this question were to be decided by the common law, it would not admit of controversy. Nothing is better settled in that law than that there can be no curtesy of a remainder or reversion. Mr. Justice Blackstone, in his Commentaries (2 Black. Comm., 127), lays it down as one of the elements of the common law. "There are (says he) four requisites necessary to make a tenancy by the curtesy—marriage, seizin of the wife, issue, and death of the wife. 1. The marriage must be canonical and legal. 2. The seizin of the wife must be an actual seizin or possession of the lands; not a bare right to possess, which is a seizin in law, but an actual possession, which is a seizin in deed. And, therefore, a man shall not be tenant by the curtesy of a remainder or reversion." And this language is fully borne out by Lord Coke, in his Commentary on Littleton (Co. Litt., 29).

Now, the common law was expressly adopted by a statute of Rhode Island as early as the year 1700, as the rule in all cases, where no particular colonial law existed on the subject. Rhode Island Colony Laws (1744), p. 28. Of course the common law must prevail unless there is some statutory provision, which has since that period intercepted or varied its application. Let us see, then, whether any such provision exists. By the statute of descents of Rhode Island (1798, 1822), it is enacted that "when a man and his wife shall be seized of any real estate in her right in fee, and issue shall be born alive of the body of such wife that may inherit the same, and such wife shall die, the husband shall have and hold such estate during his natural life as tenant by the curtesy." Rhode Island Laws, Digest, 1822, p. 227, § 8. Now this description of a tenant by the curtesy is in substance the same which Littleton (§ 35) has given of a tenant by the curtesy at the common law: "Tenant by the curtesy of England (says he) is where a man taketh a wife seized in fee simple or in fee tail, etc., and hath issue by the same wife, male

or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies the husband shall hold the land during his life by the law of England." Now, my Lord Coke, commenting on this very passage, says that the words "seized in fee" mean a seizin in deed, not a seizin in law; and therefore a man shall not be tenant by the curtesy of a bare right, title, use or of a reversion or remainder expectant upon an estate of freehold, unless the particular estate be determined or ended during the coverture. Co. Litt., 29. See Cruise's Dig., tit. 5, ch. 1, § 1, pp. 159, 160. So that it is clear that the words "seized in fee" do not necessarily, in the language of the law, import a seizin in deed, that is, a present estate in fee in possession. Now, since the rule of the common law was not only well known, but had been adopted in Rhode Island, it would be natural to expect, if the legislature intended to modify or repeal it, that some language would be used which should unequivocally, and in terms susceptible of no doubt, express that intention. In such a case we should not expect to find the very language used which the most accurate writers upon the common law were accustomed to use, to express the very rule of that law. Littleton, § 3; Cruise, Dig., tit. 5, ch. 1, § 1, pp. 159, 160; Bac. Abr., Curtesy, C. 2; Com. Dig., Estate, D. 1; Dane's Abr., ch. 130, art. 3, § 1; Buckworth v. Thirkell, 3 Bos. & Pull., 652, note. Would it be safe for any court to adopt an interpretation abolishing the common law rule, upon so loose a foundation?

The statute of Massachusetts respecting tenancy by the curtesy is in precisely the same terms as that of Rhode Island, and probably the latter was borrowed from the former. See act of 9th March, 1784; Stat. 1783, ch. 36. The uniform interpretation of the Massachusetts statute has been, that it does not vary the rule of the common law. Dane, Abr., ch. 130, art. 3, §§ 1, 2, 3. This is strong evidence to show what the fair interpretation of the terms is; or, at least, it shows that the language reasonably admits of an interpretation consistent with the rule of the common law, and in affirmance of it.

The language of the Rhode Island statute respecting dower uses terms nearly the same. It declares that the widow shall be endowed of one-third part of the lands, etc., "whereof her husband, or any other to his use, *was seized of an estate* of inheritance at any time during the coverture." Rhode Island Laws, Digest of 1822, p. 188. Yet I presume it was never contended that this applied to a seizin in law, such as a seizin of a reversion or a remainder.

But it is said that in the state of Connecticut the doctrine has been settled upon solemn argument, that actual seizin in the wife during the coverture is not necessary to entitle the husband to a tenancy by the curtesy of her estate. That certainly was the doctrine of the majority of the court in *Bush v. Bradley*, 4 Day, 298, 305, and is probably now deemed the settled law of that state. Reeve's Domestic Relations, pp. 33-35. But it is observable that the decision in that case was not founded upon any positive language of the legislature directly applicable to the case. There was no statute of Connecticut which called for any interpretation by the court. The doctrine was avowedly founded upon analogies furnished by the local law of the state. It was said that the statute of limitations of Connecticut, in its terms, did not take away the title of the original proprietor, but only tolled his right of entry; and yet that it had always been construed to bar all claim of title; while the same words in the English statute had been considered as having no effect whatever upon the title but only upon the right of entry. It was also said that actual seizin was not necessary in cases of descents or devises, but that it was sufficient that there was a right of property. And if not necessary in such cases, the ques-

tion was asked, Why should it be thought necessary to the husband's title by the curtesy? And the conclusion to which the court arrived was, that the English law respecting the efficacy of seizin had long since been departed from in Connecticut, and to adhere to it in the case of the curtesy would mar the symmetry of the law of that state.

Now, however satisfactory this reasoning was to the learned judges who decided this case, it has not been deemed equally satisfactory to other learned judges in other states, where the local jurisprudence furnished, in whole or in part, similar analogies. They have held that the common law rule must prevail, until altered by the legislature; and that they were not at liberty to imply such a repeal upon mere analogy. This doctrine is, *a fortiori*, to be followed in Rhode Island; for, the common law having been adopted by statute in that state, nothing short of a legislative repeal, either express or necessarily implied, could justify any court of justice sitting in that state in an abandonment of it. Now, I confess that I see not the slightest reason for supposing that the legislature, in the statute already cited, had the least intention to repeal the common law in regard to tenancy by the curtesy. The language of the statute is merely affirmative, leaving what is intended by the words "seized of any real estate," etc., to be ascertained upon the sound rules of interpretation applied to similar cases. It is a general rule of construction not to presume the common law repealed by a statute, unless the language naturally and necessarily leads to that conclusion. Besides, though the language is not inconsistent with a larger intent, yet the subsequent words, "the husband shall *have* and *hold* such estate during his life," more naturally apply to a present possessory estate than to one which may never fall into possession during his life.

The Connecticut law, however, cannot apply to the present case; and, indeed, is repugnant to the statute of Rhode Island. By the decision alluded to, it is not necessary that the wife should have any seizin, either in law or fact, of the estate to give her husband an estate by the curtesy. In the very case decided, she was actually disseized at all times during the coverture; and yet her husband was held entitled as tenant by the curtesy. Now, the statute of Rhode Island positively requires a *seizin* in the wife during the coverture.

Nor, indeed, in another view, is the Connecticut decision in point. There the wife had a present estate, of which she was, though disseized, entitled to a present possession. No question arose as to curtesy of a reversion or remainder. How that question would have been decided, if it had arisen, this court have no means of ascertaining.

I cannot agree with one remark of the counsel for the plaintiffs in the present case, that Eliza Gibbs, the mother of the plaintiffs, was not seized in law of the estate, because she had only a reversion therein after the tenancy of her father by the curtesy should expire. My opinion is, that there can, technically speaking, be a seizin in law of a reversion, though not in deed; and that such was her predicament. She was, in the strictest sense of the terms, seized of the reversion. *Cook v. Hammond*, 4 Mason, 488; *Plowden*, 191.

Upon the whole, my opinion is that the plaintiffs, upon the special verdict, are entitled to recover their property, as heirs of their mother, Eliza Gibbs. The district judge concurs in this opinion, and judgment is to be given accordingly.

BARR v. GALLOWAY.

(Circuit Court for Ohio: 1 McLean, 476-488. 1839.)

Opinion of the Court.

STATEMENT OF FACTS.—The plaintiff gave in evidence a patent from the United States to Charles Bradford for the land in controversy, dated the 14th May, 1796. The patentee died without issue, leaving Henry G. Bradford, Charles H. Bradford, Elizabeth J. Bradford and Fielding M. Bradford his heirs at law. Henry and Charles died intestate and without issue. Elizabeth intermarried with John Finley. They had two children, Henry Heath Finley and Elizabeth J. Finley. The latter intermarried with David Barr, the lessor of the plaintiff, and is now deceased. The plaintiff also gave in evidence a deed to him for the land from Henry Heath Finley, and here he rested his case.

The defendant gave a deed for the land in evidence from Fielding M. Bradford and John Finley, the husband of Elizabeth J. Bradford, and father of Henry Heath Finley, and of the wife of the lessor of the plaintiff; which was executed the 29th November, 1815. The wife of the grantor John Finley died before the execution of this deed. Possession was taken by the defendant a short time after the date of this deed, and there is no proof of a prior possession.

In the argument of the case it was insisted that no interest passed under the deed from John Finley to the defendant, as it was made subsequent to the death of his wife, and there is no evidence of actual seizin, which is necessary to be shown by the husband to enable him to claim the land conveyed, as tenant by the curtesy. And it is also insisted by the plaintiff, if seizin in fact by the husband during the life of his wife were not necessary, yet it is incumbent to show that at the time of the conveyance there was no adverse possession.

§ 471. *Law of tenancy by the curtesy and seizin reviewed.*

Before deeds or feoffments were used for the conveyance of land, livery of seizin was the only evidence of title. And this livery was required to be made by entering upon the land, and there in the presence of the vicinage to deliver the possession. The notoriety of the act afforded the only evidence of title, for the whole rested in the memory of the witnesses called to observe the ceremony. And after the invention of deeds and other written evidence of title, the ancient principles of the common law were only departed from so far as to consider the instrument, not as the title itself, but as the evidence of title. And that it authorized an entry on the land, without which the grantee could not convey the land, nor bring an action against a trespasser. Nor would it descend to his heirs on his decease. Without an entry, except in cases which shall be hereafter noticed, he could not bring an action on the title of the land.

1 Coke on Lit., 29, ch. 4, sec. 35. "Tenant, by the curtesy of England, is where a man taketh a wife seized in fee simple, or in fee tail general, or seized as heir in tail special and hath issue by the same wife, male or female born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the laws of England."

"And first of what seizin a man shall be tenant by the curtesy. There is in law a twofold seizin, viz.: a seizin in deed, and a seizin in law. And here Littleton intendeth a seizin in deed, if it may be attained unto, as if a man

dieth seized of lands in fee simple or fee tail general, and these lands descend to his daughter, and she taketh a husband and hath issue and dieth before any entry, the husband shall not be tenant by the curtesy; and yet in this case she had a seizin in law; but if she or her husband had during her life entered, he should have been tenant by the curtesy."

"But if a man seized of an advowson or rent in fee hath issue, a daughter who is married and hath issue and dieth seized, the wife, before the rent became due or the church became void, dieth, she had but a seizin in law, and yet she shall be tenant by the curtesy, because she could by no means obtain to any other seizin. But a man shall not be tenant by the curtesy of a base right, title, use, or of a reversion or remainder expectant upon an estate of freehold, unless the particular estate be determined or ended during the coverture." 1 Coke's Rep., 123. By the common law lands or tenements cannot pass but by solemn livery or matter of record, or by sufficient writing, if the thing lies in grant.

The wife at common law was endowable where there had been no actual possession, and the reason is that during coverture she could not take possession of the lands of her husband. 2 Coke on Litt., 358, sec. 681. "For tenant in freehold in land is he who, if he be deprived of the freehold, may have an assize, but tenant in freehold in law before his entry, in deed shall not have an assize. And if a man is seized of certain land, and hath issue, a son who taketh wife and the father dieth seized, and after the son dies before any entry made by him into the land, the wife of the son shall be endowed in the land, and yet he had no freehold in deed, but he had a fee and freehold in law."

§ 472. *Under the common law of curtesy seizin during coverture must be shown. Exceptions to the rule.*

Under the common law, actual seizin was necessary to enable the husband to claim as tenant by the curtesy. But this rule was not inflexible. It yielded to circumstances, as in the case of an advowson or rent, or where an entry is prevented by force. Litt., secs. 417, 418. In like manner, if a man have a title of entry into lands, but dare not enter for fear of bodily harm, and he approach as near the land as he dare, and claim the land as his own, he hath presently, by such claim, a possession and seizin in the lands, as well as if he had entered in deed. Litt., sec. 419. And, under some circumstances, living within view of the land will give the feoffee a seizin in deed, as fully as if he had made an entry.

1 Coke on Litt., 29, ch. 4, sec. 35. If an estate of freehold in seignories, rents, commons, or such like, be suspended, a man shall not be tenant by the curtesy; but if the suspension be but for years, he shall be tenant by the curtesy. As if a tenant make a lease for life of the tenancy to the seignories who taketh a husband and hath issue, the wife dieth, he shall not be tenant by the curtesy, but if the lease had been but for years he shall be tenant by the curtesy. And in 3 Atk., 436, the court say, lands on which there were leases for years existing and a rent incurred, descended on a wife as tenant in tail general, who survived three months after the rent day occurred, though she made no entry, nor received any rent during her life, yet this was such a possession in the wife as made the husband tenant by the curtesy.

In Boswick's Case, 5 Co., 94, it was held that letters patent under the great seal do amount to a livery in law, and must give actual seizin. As where a livery is made of one parcel of land in the name of others in the same vicinity. No livery of seizin is necessary to perfect a title by letters patent. The

grantee in such a case takes by matter of record, and the law deems the grant of record of equal notoriety with an actual tradition of the land in the view of the vicinage. The contrary is the fact as to feoffments. The deed is inoperative without livery of seizin. *Green v. Litter*, 8 Cranch, 229.

§ 473. *A perception of profits evidence of seizin.*

A perception of the profits, or, in more technical language, a taking of the esplees, is evidence of seizin, but if seizin be established, this is presumed.

§ 474. *Rule under the statute of uses.*

Under the statute of uses the bargainee without entry or livery of seizin has a complete seizin in deed. Har. Co. Litt., 261, note. In most of the states of the Union statutes have been adopted, if not in the same language, to the same effect, as the statute of uses. The delivery of the deed is substituted for the ancient form of livery of seizin. And this is held to be a seizin in deed, where there is no adverse possession at the time.

§ 475. *Entry on wild lands is not necessary to enable a husband to take as tenant by the curtesy.*

The question in the present case is, whether wild and unappropriated lands, patented by the government, can descend to a female out of possession so as to invest her husband, after her decease, with a tenancy by the curtesy, where there was no entry during coverture, either by the wife or husband. The reason on which livery of seizin was instituted fails in this case. And it is a sound maxim that where the reason of the rule fails the rule itself can have no application.

Why should a formal entry be made on land situated in a wilderness, remote from human habitation. Such an entry could not be notorious, as there is no vicinage to witness the act or preserve the fact. If the law requires nothing in vain, it cannot require an entry under such circumstances. If an entry is dispensed with, where there is a lease for years, an advowson or rent, or where force is used to prevent, as above stated, is not the reason as strong to excuse an entry on land in an uninhabited country? The law can never require an individual to do that which is either impracticable or unreasonable. And what could be more unreasonable or absurd than to require an entry on wild lands to vest a complete title in the grantee.

In the case of *Green v. Litter*, above cited, the court held emphatically that an entry was unnecessary. And the same doctrine is laid down in 4 Day, 294. And in the case of *Jackson v. Sallick*, 8 Johns., 208, the court say, where a *feme covert* is the owner of wild and uncultivated land, she is considered in law, as in fact, possessed so as to enable her husband to become a tenant by the curtesy. An actual entry or *pedis positio* by the wife or husband during the coverture is not requisite to the completion of a tenancy by the curtesy.

This is believed to be the correct rule as generally recognized in this country. Adhering to what they conceive to be the common law on the subject, the court of appeals of Kentucky hold that, to sustain a writ of right, it is necessary for the demandant to show a *pedis positio*. And on this point that court holds a different doctrine from the supreme court of the United States. Applying this rule to all cases and under all circumstances, as the court of appeals are understood to do, they are unquestionably wrong. For it has been shown that there are exceptions to the rule. But it must be admitted that the rule is of general application, only subject, like most other general rules, to certain exceptions. And it is believed that wild and uncultivated

lands in this country form as strong a case for an exception to the rule as any above stated.

§ 476. *One who seeks to avoid a deed must impeach it.*

But admitting the rule here laid down as correct, the counsel for the plaintiffs insist that it is incumbent on the person claiming under a deed to show, if not a *pedis positio*, at least that the land conveyed was wild and uncultivated, and that there was no adverse possession when the deed was executed. That these being essential to the validity of the deed, the party who claims under it must prove them.

An adverse possession cannot be presumed against a deed. If it exist, it must be shown by the party who impeaches the deed and endeavors to avoid it.

In the case of *Holt v. Hemphill*, 3 Ham., 238, the court say, we have always held that a complete title may be executed without an actual entry and where the grantee may never have been within hundreds of miles of the property granted. The delivery of the deed has been considered as giving possession in contemplation of law, and the grantor is presumed to have entered, unless that presumption is rebutted by facts wholly inconsistent with it, as where the premises at the time of the grant are in the actual seizin of a third person claiming title adverse to the grantor.

In the case of *Green v. Watkins*, 7 Wheat., 27, the supreme court observe, where the defendant shows no seizin by a *pedis positio*, but relies wholly on a constructive actual seizin, in virtue of a patent of the land as vacant land, it is competent for the tenant to disprove that constructive seizin by showing that the state had previously granted the same land to other persons with whom the tenant claims no privity. And again in the same case, the court say in a writ of right, the tenant cannot give in evidence the title of a third person, with which he has no privity, unless it be for the purpose of disproving the demandant's seizin. In the case of *Bush v. Bradley*, 4 Day, 298, the court held that proof of an adverse possession does not prevent the estate by the curtesy from attaching. But it is unnecessary to consider this point, as it does not arise from the facts in the case.

We think that the four requisites to constitute a tenancy by the curtesy, which are marriage, seizin, birth of a child, and death of the wife, have been sufficiently shown by the defendant to sustain the deed from Finley to him. Indeed, none of the requisites, except that of seizin, are disputed. And we are clearly of the opinion that there was seizin in deed in this case, which gave Finley a right to claim as tenant by the curtesy; and consequently that his deed to the defendant conveys a life estate in the premises in controversy.

IN RE MCKENNA.

(District Court, Western District of Tennessee: 9 Federal Reporter, 27-27. 1881.)

STATEMENT OF FACTS.—Petition by assignee in bankruptcy to subject to the payment of the bankrupt's debts his estate by the curtesy in the lands of his deceased wife. The petition in bankruptcy was filed in August, and the wife died in September, 1878, and the adjudication in bankruptcy was on November, 1, 1878.

§ 477. *The repeal of the bankrupt law did not affect pending cases.*

Opinion by HAMMOND, J.

The proviso to the act repealing the bankruptcy laws makes ample provision for continuing the jurisdiction of the court over all cases pending at

the time of the repeal; and there is no force in the objection that the court has no jurisdiction "since the repeal of the act to establish a uniform system of bankruptcy." Act June 7, 1878, ch. 160 (20 St., 99); *Re Richardson*, 2 Story, 571 (Constr., §§ 2712-14); *Re Ankrim*, 3 McL., 285; *Carr v. Hilton*, 1 Curt., 231; *Re King*, 3 Fed. Rep., 839; *Re Hyde*, 6 Fed. Rep., 587. That a petition like that filed in this cause is the proper remedy for the assignee, and not a plenary suit by bill or an action at law, seems well established by the authorities. *Re How*, 18 N. B. R., 565; *Re Ettinger*, id., 222; *Re Ketchum*, 1 Fed. Rep., 840; *Re Nichols*, id., 842; *Re Moses*, id., 845; *Re Campbell*, 17 N. B. R., 4; *Re Swearinger*, id., 138; *Re Peltasohn*, 16 N. B. R., 265; S. C., 4 Dill., 107; *Re Benson*, 16 N. B. R., 377; *Re Betts*, 15 N. B. R., 537; *Re Boothroyd*, id., 368; *Re Thompson*, 13 N. B. R., 300; *Re Wright*, 8 N. B. R., 430; *Re Speyer*, 6 N. B. R., 255; *Re Kempner*, id., 521; *Re Pierce*, 7 Biss., 426; *Re Smith*, 2 Hughes, 307.

§ 478. *What is the interest of a husband in his wife's lands at common law and by the Tennessee code.*

Whether the estate that the bankrupt had in the land of his wife at the date of the filing of his petition in bankruptcy passed to his assignee depends upon a proper construction of the Tennessee statute. T. & S. Code, §§ 2481, 2482. At common law he was, on that date, a tenant by the curtesy *initiate*, and about the character of that precise estate there has been much conflict in the books, and much confusion. I do not, from authorities consulted, find that it has been ever settled or agreed upon whether the husband, before or after issue born, is in possession of his estate by virtue of this tenancy, or that which he has by virtue of the marriage, considered irrespectively of the birth of issue, or the possibility of such birth. Often it is unimportant whether he is in by the one or the other, but in the conflicts that arise over marriage settlements, grants to the wife by deed or will, the statute of limitations, dissolutions of the coverture by divorce, and the effect of conveyances by the husband and the wife, one or both, the nature of this tenancy by the curtesy *initiate* has been freely discussed, but in some respects remains unsettled. Too much force is sometimes given to the death of the wife, and even to the birth of issue, when either is thought to *originate* this estate by the curtesy, and it is sometimes said, as it is argued in this case, that prior to the death of the wife it is a *possibility* only,—something like the *opes successionis* of the heir apparent or presumptive to an estate, that does not pass to a voluntary assignee, or to an involuntary assignee, by operation of law. This is not true of the estate at any period from the moment of marriage and seizin of the wife down to the consummation of the estate, if issue be born, by her death.

Whether, before seizin by the wife, a husband's possible curtesy in lands belonging to the wife would be assignable, in law or in equity, by treating the conveyance as a covenant to assign, or not, certainly, from the very moment of such seizin, he becomes a tenant by the curtesy, and that is undoubtedly the initial point at which this estate in the particular land vests in him, no matter whether it originates in the seizin or the marriage relation. And from that moment, although he may be in possession by virtue of the marital right, or *jure uxoris*, as it is sometimes called, he is also in possession by virtue of this estate by the curtesy, if the two be separable at all. Some of the authorities say he is in by both by a kind of *remitter*, and possibly they may in some sense be said to unite or merge into each other, though neither will destroy or absorb the other. But, whatever the distinctions may be in this regard, and

however for all purposes this matter may be determined, for the purpose of giving effect to his conveyances, and for the purpose of being subjected to his debts, it is vested in him whenever the necessary seizin of the wife occurs. If he convey, or it be assigned by operation of law after seizin, even before issue born, the estate by the curtesy passes, and his assignee holds, as he held it, subject to be divested by the failure of issue occurring by the death of the wife without having given birth to a child born alive; or, whether issue be born or not, by the death of the husband terminating the estate in the life-time of the wife; and in some peculiar circumstances, perhaps, by other events. The mistake is often made of supposing that the survivorship of the wife *defeats* the tenancy by the curtesy. Her survival has no such effect. His death *terminates* his life estate necessarily, whether it occurs before or after that of the wife, but it does not follow that this defeasible and determinable character of the estate reduces it to a bare possibility, or makes it an estate called into being by the happening of a contingency — either that of the birth of issue or the death of the wife in the life-time of the husband. The husband has, at best, only a life estate, and of course his death ends it, whether it happens before or after the death of the wife; and what the books mean by saying that her death consummates this tenancy by the curtesy is that from that time on there is no marital relation furnishing him any other right to possession or ownership of her lands than that which he has derived through this curtesy of the law. The death of the wife neither originates nor vests the estate, but only consummates or makes perfect that which had been before originated and vested. I shall not here critically examine the authorities consulted on the general character of this estate with a view of determining the exact scope of our statute, because, whatever may be that character, it is too well settled that it may be conveyed by the husband, may be sold under *fiери facias*, and passes to an assignee in bankruptcy, to require more than a citation of some of the cases on that point. *Gardner v. Hooper*, 3 Gray, 398; *Vreeland v. Vreeland*, 1 Green (N. J. Eq.), 513; *Boykin v. Rain*, 28 Ala., 332; *Day v. Cochran*, 24 Miss., 261; *Schermerhorn v. Miller*, 2 Cow., 439; *Gibbins v. Eyden*, L. R., 7 Eq., 371; *Morgan v. Morgan*, 5 Madd., 408; *Follett v. Tyrer*, 14 Sim., 125; *Cooper v. Macdonald*, L. R., 7 Ch. Div., 288; 1 Bish. Mar. Wom., § 489; *Hill*, Bankruptcy (2d ed.), 112, § 14. And in *Kesner v. Trigg*, 98 U. S., 50 (Conv., §§ 588, 589), no question was made but that the assignee took the estate by the curtesy. The same principle is found in *Re Bright*, L. R., 13 Ch. Div., 413, where a fund of personal estate was settled on the mother for life, and after her death on the children of the marriage, and it was held that the assignee in bankruptcy of one of the children took his share, though the life tenant did not die for nearly ten years after the bankruptcy.

Has our statute changed this result? I think not. Standing alone, section 2481 of the code would exempt the whole estate of the husband from liability for his debts, and, as a consequence, by operation of the bankruptcy act itself (R. S., § 5045), it would not pass to the assignee. But section 2482 of the code operates to restrict the quantity of the husband's estate that is exempt to so much of it as is measured by *his wife's* life. He holds the estate for his own life, and it is exempt from execution *for the life of another*, and therefore not necessarily for his own life. He asks here too much — more than this statute in terms gives him — when he claims exemption for the *whole* estate by the curtesy co-extensive with *his own* life. That the statute has not abridged his common law estate by limiting it to the life of his wife is plain, because he

claims it after her death, and during his own life, and this he can do only on the theory that the statute has not interfered with his common law estate in this land in regard to its quantity. If the statute has preserved to him his tenancy by the curtesy it has preserved it to his creditors, because the statute only cuts them off during the life of the wife.

It has been said in the books that a tenancy by the curtesy stands somewhat as if the wife had made a lease of the land to her husband for his life, the reversion being in her or her heirs. Now, out of this estate of the husband the statute carves a portion which it exempts from execution, and that portion does not pass to an assignee in bankruptcy; not because of any peculiarity in the estate itself as being unassignable, but because the bankruptcy laws have in terms declared that property so exempt shall not pass to the assignee. It cannot, then, I think, be successfully claimed that the portion which we may call a surplus remaining after the wife's death is also exempt.

The next argument to be considered is that the estate now enjoyed by the husband is subsequently acquired property coming to him on the death of his wife, happening since the petition in bankruptcy was filed. This, to my mind, involves a total misapprehension of the nature of the estate of tenancy by the curtesy, and can only be sustained on the theory that the statute has created a new kind of estate for the husband in his wife's lands, or, rather, two estates. One of these, which he enjoys during her life, and in the enjoyment of which he was when the petition in bankruptcy was filed, is claimed as exempt property; and, as to the other, that it was created for him, or was called into existence by the death of the wife happening since the bankruptcy. During his wife's life this latter estate, it is argued, was a mere possibility which did not pass. The case of *Jackson v. Middleton*, 52 Barb., 9, is very much relied on to sustain this position. It should be read in connection with *Moore v. Littel*, 40 Barb., 488; 3 Am. Law Reg. (N. S.), 144, where the same deed was construed. There was a deed to John Jackson for his life, and after his death to his heirs and their assigns. It was held that during the life of the life tenant the heirs had "an alienable contingent estate in remainder," and that this estate, under a New York statute which subjected "lands, tenements or hereditaments" to execution, was not liable to that writ. But a tenancy by the curtesy, in my judgment, has no sort of analogy to such an estate as the one mentioned in that case. If, however, this be incorrect, it is a sufficient answer to say that our bankrupt statute is much broader, and vests in the assignee all the estate, real and personal, of the bankrupt. R. S., § 5044. *Krumbaar v. Burt*, 2 Wash., 406, is also relied on, where it was decided that, under the act of 1800, possibilities did not pass. But our later acts are more enlarged in their operation; and even under the old acts this case was not approved, but overruled. *Belcher v. Burnett*, 126 Mass., 230; *Comegys v. Vasse*, 1 Pet., 193, 218; *Vasse v. Comegys*, 4 Wash., 570; *Nash v. Nash*, 12 Allen, 345. Under the old English acts, which were "very darkly penned" (*Re Marsh*, 1 Atk., 158), when the creditors only took "all such interest in lands as the bankrupt may lawfully depart withal," — *Comegys v. Vasse*, 1 Pet. (original edition), 200, — it was at first determined that only such interests as were alienable at law passed to the assignee, but afterwards it was held that such as were assignable in equity also passed; and possibilities coupled with an interest came to be regarded as assignable. Our bankruptcy act was intended to relieve us of all this trouble by using the most comprehensive terms, and there can be no doubt that every character of property belonging to the bankrupt himself passes. Bare possi-

bilities—such, for instance, as the hope that one has that his father or other relative will die intestate, leaving him an inheritance—do not pass; but I cannot see that the tenancy by the curtesy, either at common law or under this statute, is of that character.

§ 479. *What interest of a husband in his wife's lands passes to his assignee in bankruptcy, the wife dying pending proceedings.*

It is also argued, in support of the position that this estate of the husband did not pass, that "the assignee in bankruptcy does not take the whole legal title, as heirs and executors do, but only such estate as the bankrupt has a beneficial interest in;" and this is true. If he has not a beneficial interest in a tenancy by the curtesy *initiate*, it is difficult to see why he has not. He has not so great benefit under the statute as he had at common law, for there are restrictions on his powers of alienation and restrictions on the right of his creditors to subject his interest to their debts; but in neither respect has his interest been wholly demolished, and the assignee only claims by this petition that beneficial interest which the statute left to him. This above-quoted formula is often found in the authorities, but I do not find that it has ever been applied to save to the bankrupt any property that belonged to him, but only such as belonged to third persons and which was held by him under some kind of trust relation. In the earlier stages of bankruptcy legislation, when the statutes were not so elaborate as now, it was a principle resorted to and established by the courts to save to third persons their rights in property which the bankrupt held for them, and to prevent the devolution of such trusts on the assignee, who did not become a general administrator of the bankrupt's legal and equitable powers over all property, doing in his stead for others what the bankrupt was required to do, but was restrained in his title to the property of the bankrupt which creditors could apply to their debts. The assignee, for example, takes subject to a wife's right of dower, to her right of survivorship; subject to her right to an equitable settlement; subject to all defeasances and contingencies in her favor, or in favor of any third person, for that matter; subject to the liens of a mechanic, or a factor, or the like; subject to the right of rescission of a contract for fraud, in some instances; subject to the *estoppels* on the bankrupt, where they do not grow out of some fraud on creditors; and, generally, subject to all trusts, liens and burdens existing at the time. In some cases the circumstances were such the assignee took nothing, and in some only the surplus after the burdens were satisfied. *Brown v. Heathcote*, 1 Atk., 160; *Scott v. Surman*, Willes, 400; *Mitford v. Mitford*, 9 Ves., 87; *Re Dow*, 6 N. B. R., 10; *Rogers v. Winsor*, id., 246; *Re McKay*, 1 Low., 345; *Re Faxon*, id., 404; *Re Griffiths*, id., 431; *Goddard v. Weaver*, 1 Woods, 257; *Re Hester*, 5 N. B. R., 285; *Eberle v. Fisher*, 13 Pa. St., 526; *Eshelman v. Shuman*, id., 561; *Keller v. Denmead*, 68 Pa. St., 449; *Ontario Bank v. Mumford*, 2 Barb. Ch., 596.

Here, again, our bankruptcy statutes have recognized and declared this principle, and provide that no trust estates shall pass, and that all liens and rights of third persons shall be preserved, so that the assignee either does not take at all, or else takes subject to the liens and burdens. R. S., 5053, 5075, 5044, and notes; Bump, *Bankruptcy* (10th ed.). Applying the principle here, the assignee took the tenancy by the curtesy *initiate* as it existed at the date of the petition in bankruptcy, subject to the right of the wife, if she survived her husband, to defeat his estate; or, more accurately, subject to the determination that would come by his death, and subject to her rights under

this Tennessee statute to remain in possession during her life, jointly with her husband, and that they should, *during that time*, enjoy the estate without disturbance by his creditors or his assignees of any kind, whether in bankruptcy or any other, unless she, by her deed according to law, should consent to give up the land. And it is possible that, by joint deed of the husband and wife, the assignee's title might have been defeated, even after the bankruptcy, in the same way as is sometimes done where she has a power of appointment; but it is not necessary to decide that here, as no such conveyance was made, and it is well settled that where she has the power to defeat his estate by appointment or conveyance of any kind, her failure to exercise it preserves his rights. The statute operates as a settlement upon her to that extent, but no further. And it is to be observed that it does not, as some statutes do, create a separate estate in the wife, nor destroy his estate in his wife's lands, either that he holds *jure uxoris*, or the larger estate of tenancy by the curtesy.

It is always a question of intention whether the legislature has, by such statutes as these, cut off the husband's marital rights entirely or only partially; and they are construed, just as wills, deeds, marriage settlements, and other conveyances are, to go no further in that direction than the language used, in terms or by necessary implication, requires. This construction I have given the statute is supported by every Tennessee case which has construed or mentioned it. *Johnson v. Sharp*, 4 Cold., 45; *Dodd v. Benthall*, 4 Heisk., 601; *Bottoms v. Corley*, 5 Heisk., 1; *Corley v. Corley*, 8 Bax., 7; *McCallum v. Petigrew*, 10 Heisk., 394; *Lucas v. Rickerich*, 1 Lea, 726; *Young v. Lea*, 3 Sneed, 249; *Coleman v. Satterfield*, 2 Head, 259; *Gillespie v. Worford*, 2 Cold., 632; *Aiken v. Suttle*, 4 Lea, 103.

It is also supported by the cases construing settlements on the wife by will or deed, where the benefits conferred, the language used, and the restrictions on alienation and the husband's marital rights are similar to those in this statute. *Brown v. Brown*, 6 Humph., 126; *Hamrico v. Laird*, 10 Yerg., 222; *Frazier v. Hightower*, 12 Heisk., 94; *Baker v. Heiskell*, 1 Cold., 641; *Appleton v. Rowley*, L. R., 8 Eq., 139; *Marshall v. Beall*, 6 How., 70; *Moore v. Webster*, L. R., 3 Eq., 267; *Bennet v. Davis*, 2 P. Wms., 316; *Eden*, Bankruptcy, 245; 25 Law Lib., 193.

It also finds a complete analogy in the construction of our homestead statutes, which confer a similar benefit on the husband, wife and children, and yet it is held that creditors may subject the husband's interest, subject to this right of occupancy and possession by the family, which may last during the life of the husband and wife or the survivor, and until the youngest child reaches a certain age. *Moore v. Hervey*, 1 Leg. Rep. (Tenn.), 22; *Mash v. Russell*, 1 Lea, 543; *Lunsford v. Jarrett*, 2 Lea, 579; *Gilbert v. Cowan*, 3 Lea, 203; *Gray v. Baird*, 4 Lea, 212; *Jarman v. Jarman*, id., 671, 676. In *Marsh v. Russell*, *supra*, it is said, "the vendee is clothed with the legal title in reversion expectant on the termination of the homestead estate," which quite as accurately describes the kind of estate the assignee took in this case.

The same ruling has been made in other states where the statutes give a qualified homestead exemption, while in those where the exemption is absolutely of the whole estate the assignee takes nothing. *Rix v. Capitol Bank*, 2 Dill., 367; *Re Tertelling*, id., 339; *Re Betts*, 15 N. B. R., 537; *Johnson v. May*, 16 N. B. R., 425; *Re Watson*, 2 N. B. R., 570; *Re Poleman*, 5 Biss., 526; *McFarland v. Goodman*, 6 Biss., 111; *Re Hinkle*, 2 Saw., 305; *Re Hunt*, 5 N. B. R., 493; *Re Vogler*, 8 N. B. R., 132; *Re Sinnett*, 4 Saw., 250.

It also finds support in the cases construing statutes of this and other states for the benefit of married women or their families. *Cooper v. Maddox*, 2 Sneed, 135; *Lyon v. Knott*, 26 Miss., 548; *Rabb v. Griffin*, id., 579; *Stewart v. Ross*, 54 Miss., 776; *Hatfield v. Sneden*, 54 N. Y., 280; *Re Winne*, 1 Lans., 508; S. C., 2 Lans., 21; *Thompson v. Green*, 4 Ohio St., 216, 232; *Plumb v. Sawyer*, 21 Conn., 351; *Silsby v. Bullock*, 10 Allen, 94; *Staples v. Brown*, 13 Allen, 64; *Walsh v. Young*, 110 Mass., 396, 399.

Upon consideration of these authorities it will be found to be a general principle that, whether the settlement is made by statute, deed, will or contract, the husband's marital rights are not interfered with further than the terms of the settlement go, and that what remains to him can be subjected by his creditors as if the settlement had not been made; and it is as well settled as it is possible to be, that the circumstance that the wife is to receive the rents or profits or to enjoy the estate during her life, or that the husband is forbidden to convey it except with her consent, or that she may alone or jointly with him convey it or defeat the husband's estate by appointment by will or otherwise, will not, nor will any of them combined, alter the construction so as to affect or defeat his marital rights, nor the estate of his assignee or purchaser, except strictly according to the terms of the settlement. If an estate remains to him after her death as the residuum of what he would have had but for the settlement, his creditors may subject it, and it passes by his deed subject to be defeated if she survives or dies without exercising her powers of alienation.

Finally, there is an unreported case in this court, *In re Stack*, a bankrupt (June, 1879), in which the circuit judge, sitting for the district judge, who was incompetent, upon the same principle decided in favor of the assignee. The wife of the bankrupt, under a deed from him, held land to her "sole and separate use and benefit, free from the debts, liabilities and control of her present or any future husband, with power to sell, by joint deed with her husband, for reinvestment on same trusts, and if she should die in the life-time of her husband, then to revert to him in fee-simple." The estate of her husband was not mentioned in the schedules of the bankrupt, as in this case, he deeming it secure from the operation of the bankrupt law, and the wife died pending the proceedings in bankruptcy, as here, whereupon the assignee filed a petition like that in this case, and the court compelled the bankrupt to surrender the land to the assignee. Under this deed the wife had all the protection she would have had under this statute, and a larger estate than she would have had if she had inherited the land or held it by an ordinary conveyance. Besides, the land itself was, at the date of the petition in bankruptcy, under the protection of this statute, both as to the interest of the wife and that of the husband. And, as to his interest, the only difference I can see is that there he had a reversionary estate in fee-simple, contingent upon his surviving his wife, but liable to be defeated also by their joint deed (leaving out the reinvestment clause), while here the bankrupt had a life estate, subject to the same contingencies. It was ruled that this estate was vested at the time of the bankruptcy, and did not vest at the death of the wife, and was, therefore, not subsequently acquired property. Furthermore, the ruling must have been the same in that case if Stack had had no contingent reversionary interest under the deed, and it had appeared there was issue of the marriage, for he was, in that event, a tenant by curtesy, notwithstanding this was a separate estate, and would have held the land for his life, unless it may be the words "free from the debts, liabilities or control of any future husband" should be construed to entirely cut

off his (Stack's) curtesy. I do not see any difference in principle between that case and this, because if Stack had under that deed such an interest as passed to his assignee during the life of his wife, subject to her rights under the deed and this statute, I do not see why the bankrupt here did not have, by the common law regulating the tenancy by the curtesy, such an interest in his life estate as passed, subject to the rights of his wife and his own under the statute.

The objection, in this view of the case, that the children of the wife are not parties to this proceeding, is not tenable. The assignee only claims the life estate of the bankrupt, and in this the children have no interest. Motion overruled.

MAYBURY v. BRIEN.

(15 Peters, 21-39. 1841.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is a suit in chancery which is brought before this court by an appeal from the decree of the circuit court of Maryland.

The complainant is the widow of Willoughby Mayburry, and claims dower from John Brien, who purchased an estate, designated the Catootin Furnace, and all the lands annexed or appropriated to it. She also claims rents and profits from the death of her husband. This estate was conveyed by Catharine Johnson, Baker Johnson and William Ross, as executors of Baker Johnson, to Willoughby and Thomas Mayburry, by deed, dated the 5th March, 1812; and they executed a mortgage on the same to secure the principal part of the purchase money. The 9th March, 1813, Thomas Mayburry conveyed to Willoughby his undivided moiety in the estate; and at the same time the grantee executed a mortgage on the estate to secure the payment of the purchase money.

The answer admits the marriage of the complainant prior to the execution of the conveyance and mortgage, in 1812; and the death of the husband, which occurred subsequently.

Brien having deceased, his heirs were made parties to the suit.

The circuit court dismissed the bill, and the counsel for the defendants ask the affirmance of that decree on two grounds. 1. Because the estate vested in Willoughby and Thomas Mayburry was a joint tenancy, and not subject to dower. 2. That the mortgage was executed by Willoughby Mayburry to Thomas simultaneously with the delivery of the deed from Thomas to Willoughby, and that dower does not attach to a momentary seizin.

§ 480. *Notwithstanding Maryland statute of 1822 abolishing joint tenancies, an earlier deed importing a joint tenancy must be construed as creating it.*

The counsel for the complainant insists that the deed of the executors of Johnson to the Mayburrys created a tenancy in common, and not a joint tenancy. It is admitted that the terms of this deed import a joint tenancy; but it is insisted that the nature of the property, and the circumstances of the parties, show a tenancy in common. That real estate conveyed for partnership purposes constitutes an estate in common, and that the conveyance of this furnace, and the land incident to it, was for manufacturing purposes, and comes within this definition. No evidence being given on the subject, the counsel relies upon the above considerations as fixing the character of the estate.

In the case of *Lake v. Craddock*, 3 P. Wms., 159, the court held that survivorship did not take place where several individuals had purchased an estate, which was necessary to the accomplishment of an enterprise in which they

were engaged. That the payment of the money created a trust for the parties advancing it, and that as the undertaking was upon the hazard of profit or loss, it was in the nature of merchandising when the *jus accrescendi* is never allowed. And in the case of *Coles' Administratrix v. Coles*, 15 Johns., 159, it was decided that, when real estate is held by the partners for the purposes of the partnership, they hold it as tenants in common; and that, on a sale of the land, one of the partners receiving the consideration money was liable to the action of the other for his moiety. *Thornton v. Dixon*, 3 Brown's Ch., 199; *Balmain v. Shore*, 9 Ves. Jr., 500.

By a statute of Maryland, in 1822, ch. 262, joint tenancy is abolished; and it is contended that, this being the settled policy of the state, the courts should give a liberal construction to conveyances prior to that time, to guard against the inconvenience and hardship, if not injustice, of that tenancy. Whether this estate was purchased by the Mayburrys for the purpose of manufacturing iron, for speculation, or for some other object, is not shown by the evidence; and it would be dangerous for the court, without evidence, to give a construction to this deed different from its legal import. We must consider the property as conveyed in joint tenancy; and the question arises, whether dower may be claimed in such an estate.

§ 481. *Dower cannot be claimed of an estate held in joint tenancy.*

Dower is a legal right, and whether it be claimed by suit at law or in equity the principle is the same. On a joint tenancy at common law, dower does not attach. *Coke on Litt.*, lib. 1, ch. 5, § 45. "It is to be understood that the wife shall not be endowed of lands or tenements, which her husband holdeth jointly with another at the time of his death; and the reason of this diversity is, for that the joint tenant, which surviveth, claimeth the land by the feoffment and by survivorship, which is above the title of dower, and may plead the feoffment made to himself, without naming of his companion that died."

In 3 Kent's Com., 37, it is laid down that the husband must have had seizin of the land in severalty at some time during the marriage to entitle the wife to dower. No title to dower attaches on a joint seizin. The mere possibility of the estate being defeated by survivorship prevents dower. The same principle is in 1 Roll. Abr., 676; Fitzh. N. B., 147; Park on Dower, 37; 3 Preston's Abstracts, 367. If the husband, being a joint tenant, convey his interest to another, and thus at once destroy the right of survivorship, and deprive himself of the property, his wife will not be entitled to dower. *Burton on Real Property*, 53; *Co. Litt.*, 31b. But it is insisted that the rule which denies dower in an estate of joint tenancy applies only in behalf of the survivor; and that, if in this case the deed created a joint estate, the plaintiff may claim, after the deed of release to her husband.

At the time the deed to the Mayburrys for this property was executed by the executors, a mortgage on the property was given by the Mayburrys to secure the payment of a large part of the purchase money. The deed bears a date prior to that of the mortgage, but the proof is clear that both instruments were delivered, and consequently took effect at the same instant of time. The time of delivery may be proved by parol. And it also appears that the deed to Willoughby Maybury, and the mortgage from Thomas to him, were delivered at the same time.

And here two questions arise: 1. Whether dower attaches where there has been only a momentary seizin in the husband? 2. Whether, in Maryland, dower may be claimed in an equity of redemption?

§ 482. *Before the statute of 1818 dower could not, in Maryland, attach to an equity of redemption.*

By the common law, dower does not attach to an equity of redemption. The fee is vested in the mortgagee, and the wife is not dowable of an equitable seizin. *Dixon v. Saville*, 1 Bro. Ch. Ca., 326; *Co. Litt.*, 3*b*; *Stelle v. Carroll*, 12 Pet., 205 (§§ 501-503, *infra*). This rule has been changed in Maryland by the tenth section of the act of 1818, ch. 193, which gives dower in an equitable title under certain restrictions; and in many of the states a different rule obtains by statutory provision, or by a judicial modification of the common law. As the right of the complainant depends on conveyances prior to 1818, the above statute can have no effect upon it.

§ 483. *Dower does not attach on a seizin for an instant.*

As before stated, the mortgage was delivered by Willoughby Mayburry at the same instant he received the deed from Thomas; and the question is, whether dower can be claimed by the wife on such a seizin of the husband? In his Commentaries, Chancellor Kent says, vol. iv, 38, 39, that "a transitory seizin for an instant, when the same act that gives the estate to the husband conveys it out of him, as in the case of the conusee of a fine, is not sufficient to give the wife dower; the same doctrine applies when the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor or to a third person, to secure the purchase money in whole or in part, dower cannot be claimed as against rights under that mortgage; the husband is not deemed sufficiently or beneficially seized by an instantaneous passage of the fee, in and out of him, to entitle his wife to dower as against the mortgagee."

Of a seizin for an instant, a woman shall not be endowed. 1 *Co. Litt.*, ch. 5, § 36. This is the well established doctrine on the subject. *Holbrook v. Finney*, 4 Mass., 566; *Clark v. Munroe*, 14 Mass., 352; *Stow v. Tift*, 15 Johns., 458. The plaintiff insists that the principle which excludes dower in a case of a momentary seizin applies only where the grantor acts in carrying out a naked trust. This position is not sustained by the authorities.

In the case of *M'Cauley v. Grimes*, 2 Gill & J., 324, the court say: "Perhaps there is no general rule, in strictness, that in cases of instantaneous seizin the widow shall or shall not be entitled to dower." And they say: "Where a man has the seizin of an estate beneficially for his own use, the widow shall be endowed." What may be a beneficial seizin in the husband, so as to entitle his widow to dower, may be a matter of controversy, and must lead to some uncertainty. But in the language of Chancellor Kent, where a mortgage is given by the grantee, at the same time the conveyance of the land is executed to him, there is no such beneficial seizin in him as to give a right to dower. The incumbrances in this case exceed, it is believed, the value of the estate; and this being the case, the grantees could in no sense be said to be beneficially seized, so as to sustain the claim of the complainant.

Upon the whole, the decree of the circuit court is affirmed.

POWELL v. MONSON & BRIMFIELD MANUFACTURING COMPANY.

(Circuit Court for Massachusetts: 3 Mason, 347-377. 1824.)

Opinion by STORY, J.

STATEMENT OF FACTS.—This is a bill in equity, for an assignment of dower. I pass over, without observation, any defects in the bill and answers which

might raise a question as to the sufficiency and accuracy of the proceedings, because I understand it to be the wish of all the parties to have the case finally adjudged upon the merits, as they have been stated and relied on at the argument.

There are various parcels of land of which dower is claimed, and it is conceded on all sides, that as to one parcel designated as lot No. 7, which was conveyed in 1812 by Lavina Utley to Roswell Merrick (the former husband of Mrs. Powell), to some extent, she is entitled to dower. It is unnecessary to take any farther notice of this part of the case at present, because it is understood that the parties can ascertain the portion subjected to her claim by an amicable arrangement.

The principal points arising in the case depend upon local law and are involved in some obscurity. I would gladly follow the doctrine of the supreme court of the state if any case had completely decided them. But, unfortunately for the cause, some of the points have never undergone any direct adjudication, and the court is left to grapple as it may with the difficulties presented by a new posture of facts, and with very imperfect lights to direct it.

The first question arises in respect to a parcel of land conveyed by Thomas Riddle to the husband of Mrs. Powell, in 1808. Riddle was seized of the land in right of his wife, who was owner of the fee, and she has signed and sealed the deed, but the husband alone is named as grantor in the deed, and there are no words in the body of the deed containing a grant or release on her part. Under these circumstances it is very clear that nothing passed by the deed but the life estate of Riddle; for though, by our local law, a wife, by joining with her husband in the deed, may convey her estate, yet the deed must contain apt words to make her a grantor, otherwise the deed conveys only the right of the husband. This point has been expressly decided by the supreme court of the state (*Fowler v. Shearer*, 7 Mass., 14; *Lithgow v. Kavenagh*, 9 Mass., 161; *Catlin v. Ware*, 9 Mass., 218; *Lufkin v. Curtis*, 13 Mass., 223); and, in my humble judgment, with entire correctness. We may then dismiss any farther consideration of this point.

§ 484. *A deed of land executed by the wife with her husband, but containing no words relinquishing dower, etc., does not convey right of dower.*

The next question in the case turns upon the same principle. Mrs. Powell signed and sealed certain deeds executed by her late husband, conveying certain parcels of the demanded premises in fee, but no words of relinquishment of her dower, or any other interest, are found in the deeds. The case, therefore, is precisely that of *Catlin v. Ware*, 9 Mass., 218, and *Lufkin v. Curtis*, 13 Mass., 223, where the court held that the deeds did not bar the wife of her dower, upon the plain reason that a deed cannot bind a party sealing it, unless it contains words expressive of an intention to be bound.

The most important question in the case remains to be considered, and in order to present it with accuracy it is necessary to state the leading facts. Mr. Merrick (the late husband of Mrs. Powell), being seized in fee of a number of parcels of land (embracing the principal closes now in controversy) in common with two other persons, by deed, dated the 10th of January, 1816, conveyed the same for the asserted consideration of \$50,000 to the Union Cotton Manufacturing Company, since, as it is admitted, known by the corporate name of the Monson & Brimfield Manufacturing Company, with covenants of seizin and against incumbrances, and of general warranty. To this deed Mrs. Powell

is not a party. Subsequently, on the 2d of April, 1816, the Union Cotton Manufacturing Company, for the asserted consideration of \$20,000, duly conveyed the same lands to one Henry Mellen in fee. On the 26th of August of the same year, Mellen, for the like consideration, duly conveyed the same land back to the company. On the same day Mrs. Powell and Mrs. Pearce (the wife of one of the co-grantors with Merrick) signed, sealed and executed on the back of the original deed of the 10th of January, 1816, an instrument in the following words: "Monson, August 26, 1816. In consideration of \$200 to us paid by the Union Cotton Manufacturing Company, we, Elizabeth Merrick and Lucretia Pearce, relinquish and quitclaim all our right, title and interest of dower to the within described premises." Then follow their signatures and seals, with an attestation of two witnesses. The execution of the instrument is proved by one of the attesting witnesses, who states that Mr. Merrick, sometime before, requested him to take the deed to his wife, and obtain her release; that he did not pay any money to the releasors; that the instrument was read over to them, and they were requested to sign it, and it was stated to them to be necessary in order to complete the title; and that it was understood, when the deed itself was originally executed, that they should become parties to it. To this instrument as a sufficient release, several objections have been taken on behalf of the plaintiffs. First, it is said, that there is no grantee named in the deed, and therefore it cannot operate as a release. But the consideration is admitted in the deed to be paid by the company; and therefore, however artificially drawn, the deed must be construed as a release to the company. Next, it is said, that it is not proved that the company was then in possession of the land, because they had parted with the title to Mellen, and though his deed was executed on the same day, *non constat* that it was prior in point of execution, so as to revest the fee. But to this it is a sufficient answer, that the court, in order to give validity to the deed, is bound to presume the prior execution of the conveyance of Mellen, as best agreeing with the acts of the parties; and, what is not unimportant, the release being for a valuable consideration, which the releasors are estopped by their deed to deny, it might, if necessary, be made to operate as a bargain and sale, in order to effectuate the intention of the parties. See *Shove v. Pincke*, 5 Term, R., 124; *Coventry v. Coventry*, 1 Str., 596, and *Jackson v. Fish*, 10 Johns., 456; *Marshall v. Fisk*, 6 Mass., 24, 32; *Gibson v. Minet*, 1 H. Bl., 614, 615, per Eyre, C. J.

The great objection, and which presses heavily on the cause, is, that the deed itself is utterly void for want of the husband's being joined in it. At the common law the deed of a married woman is *ipso facto* void, and she is incapable of passing her estate, except by fine, or some other equivalent act of record. But in Massachusetts, from the earliest times, a different rule has prevailed. Fines, as conveyances, have never been in use in this state; and the doctrine is established, that a married woman may convey her estate, and extinguish her dower, by joining her husband in the deed of conveyance. When this doctrine was first adopted it is not now possible to ascertain with entire certainty; and by some of our ablest lawyers and judges it has been resolved into New England common law. It is not improbable that it took its rise from the colonial act of 1644, which secured to the wife her dower, unless barred "by some act or consent of such wife, signified by writing under her hand, and acknowledged before some magistrate or others, authorized thereto." Col. & Prov. Laws (ed. 1814), ch. 37, p. 99; *Doe v. Salkeld*, Willes, 673. After the charter of William and Mary, the provincial act of 9 Will.,

ch. 7 (Col. & Prov. Laws (ed. 1814), ch. 48, p. 308 [1697], for registering of deeds and conveyances, may be thought to have recognized the validity of this mode of releasing dower, by providing, "that nothing in this act shall be construed, deemed, or extended, to bar any widow of any *vendor*, or *mortgagor*, of lands or tenements from her dower, or right in or to such lands or tenements, *who did not legally join with her husband in such sale or mortgage*, or otherwise lawfully bar or exclude herself from such her dower or right." This provision has been in terms incorporated into our statute of 1783, ch. 37 (1 Mass. Stat. (ed. 1823), p. 111), respecting conveyances of real estate, and constitutes a part of the existing law upon the subject. But as the clauses, with the exception of the words "vendor" and "sale," is a mere transcript of a proviso in the English statute of 4 and 5 William and Mary, ch. 16, § 5, passed only five years before, to prevent frauds by clandestine mortgages, it is to be considered as referring, not so much to any local mode of barring the wife's estate, as to the extinguishment of her dower in any legal manner whatsoever.

The construction put upon the last words of the clause, "or otherwise lawfully bar or exclude herself from such dower," has never been that it let in any usage, or practice, not consonant with the principles of the common law. On the contrary, it has, as far at least as decisions have gone, been always limited to such bars of dower as were recognized by the common law. Chief Justice Parsons (and no man was better acquainted with our local law), in commenting on this very proviso in *Fowler v. Shearer*, 7 Mass., 14, 20, plainly understands the words in this sense. His language is, "when, therefore, the widow is not barred by a jointure, and does not join with her husband in the sale, she shall have her dower." The question, therefore, is narrowed down to the interpretation of the other words of the clause, or what is a joining with her husband in the sale, within the sense of the statute. Now we have the exposition of the same learned judge upon this part of the statute in the same case. "The usual mode," says he, "by which a wife is joined is by introducing her in the close of the deed, as expressly relinquishing all claim to dower in the premises sold, and by executing the deed with her husband." This is perfectly plain and unambiguous. But he adds, "and has been sometimes done by her *separate deed*, *subsequent* to her husband's sale, in which *the sale is recited as a consideration*, on which she relinquishes her claim to dower."

It is this sentence which creates the whole difficulty in the argument at the bar. If it means that it may be done by a separate deed of the wife, executed after the deed of her husband, but on the same day, or as a *part of the same transaction*, then there is no difficulty in reconciling it with the language of the statute, for the wife may be truly said to join in the sale, when she is a party to it, at the time when it is made, whether she join in her husband's deed or execute a separate deed. And the words of the learned judge are not inconsistent with this construction. Although he speaks of a separate deed of the wife, subsequent to the sale by her husband, this may well be limited to mean that the husband's act of sale must have a legal priority to satisfy the words of the statute. And the words, "in which the sale is recited as a consideration," favor the notion that the learned judge had in view such cases only in which the sale was the moving consideration, and the act was part of the *res geste* in the contemplation of all parties. But the argument at the bar assumes a much broader construction, and asserts that the words are intended to include all cases of the subsequent execution of a separate

deed, at however distant a period, where the assent of the husband may be presumed, and there is, in fact, no other consideration but what passed originally to the husband. If this be so, then the departure from the language and apparent intent of the statute is very striking; and it ought to be justified by some usage so extensive and so fully recognized as to have become a part of the law. Now the learned judge himself asserts no such fact; his language is, "it has been sometimes done," not that it is commonly done, or has been received as a legitimate mode of conveyance, by the general practice and sense of the profession. If mere irregularities, even to a great extent, could make or change the law, the deeds of *femes covert* joining with their husbands in the execution of the deeds, but without any words of release to bind them, would have been held as a bar; for the practice is shown to have been very extensive and ancient in the western part of the state. And yet the court did not hesitate to overrule it as founded in a clear mistake of law. But if we assume the broadest construction of the language in *Fowler v. Shearer*, it does not come up to the present case. If it did, though I might hesitate as to its being a just interpretation of the words of the statute, I should not scruple to follow it until an opportunity was given to the state court itself to reconsider and examine the extent of that *dictum* in a case directly bringing it in judgment. But the present case falls far short of it. Here the deed is executed after the lapse of seven months, and after two intermediate conveyances, upon a new consideration, not in the original deed, and not reciting the original sale as the leading consideration. So that the court is called upon, not only to desert the plain import of the statute, but to take a new course, which shall remove the limitations hitherto affixed to the departure.

First, it is argued that it is sufficient to satisfy the statute that there is an assent of the husband to the deed, and that assent may be implied as well as expressed by his joining in the conveyance. Now, how does this stand with the text of the statute? It is nowhere said that the wife shall be barred of dower if she releases with the consent of the husband; the words of the statute are, that she shall not be barred if she "did not join with her husband" in the sale. It is his sale, therefore, in which she is to join, and not her subsequent deed, to which he is to assent, that constitutes the bar.

Then, again, as to the assent of the husband. It is inferred from the fact of a full consideration paid upon the sale, and the covenant against incumbrances, and especially against dower, and the covenant of general warranty in the deed. But it is too much to infer from these facts any intention or contract to procure the wife to release her dower. Creditors often take deeds of this sort without any notion that the dower is to be relinquished; and though cases may not be very frequent in which, upon a fair purchase, this possible incumbrance is not stipulated to be released, yet it is within the experience of all of us, that cases of this sort do arise, and the title is thought worth the purchase. Nor am I prepared to admit the doctrine contended for at the bar, that a covenant against incumbrances is broken by the mere existence of a possible incumbrance; and that, therefore, every deed containing such a covenant imports a contract to procure its extinguishment. A possibility of dower is not, within the sense of the covenant, an incumbrance, for that means a settled, fixed incumbrance; and if the result of the Massachusetts authorities on this point has not been mistaken by me, taking them collectively, they do not sustain the doctrine now contended for. See *Marston v. Hobbs*, 2 Mass., 433; *Bickford v. Page*, 2 Mass., 455, 461. But it may be urged that the parol proof

helps this presumption, by its direct and positive declarations. And so it would if it stood alone. But here, if it was originally designed that the wife should execute a release of dower, why was not her name inserted in the deed? Why was no conveyance written or insisted on for seven months, or until two mesne conveyances? Why, if she originally agreed to join in the sale, for that is the material fact, was it necessary to employ a person to explain the nature of the title to her, or to persuade her to execute the release under the suggestion that her husband wished her so to do? Why was not the husband present at the execution of the deed, and himself made the medium of explanation to his wife? It appears to me that these questions are not easily or satisfactorily answered by the circumstances now in evidence. For aught that appears, the original consideration was fully paid, before the release of dower was demanded. There is another fact bearing upon this point. I mean the alleged consideration of \$200 paid for the release. It is said this was never paid; but can the parties be let in by parol evidence to contradict the admission in their own instruments of title? And if they could 'be so let in, still does not the insertion of a new consideration in the release repel the presumption that the original sale was understood by the parties to include a relinquishment by the wife of her right to dower? It appears to me that it would be extremely dangerous to bolster up imperfect instruments in this way, by conjectures and inferences, and parol evidence, standing in the way of the written acknowledgment of the parties. The cases cited at the bar to show that the consent of the husband is equivalent to joining in certain acts of his wife to give them validity at the common law are inapplicable. They turn upon principles or practices in peculiar and limited proceedings, and not upon the construction of a statute. *Mary Portington's Case* in 10 Co., 36, 43, decides only that a fine, levied by a *feme covert*, shall bind her and her heirs, if her husband doth not enter and avoid the estate of the conusee; and the reason given is, because she is examined in court, and has a power over the land. The court went no further in *Moreau's Case*, 2 W. Bl., 1205, than to suffer a fine to be levied by his wife, when the husband was abroad, and had covenanted that such a fine should be levied. *Compton v. Collison*, in 1 H. Bl., 334, adjudged that the wife may surrender her copyhold without the husband's joining, where he had covenanted, under articles of separation, that she should enjoy all her estate during coverture to her separate use. It is sufficient to say that the present is not the case of a fine or surrender, but an act which, at the common law, would be held utterly void; and is supported only by the authority of our statute and local usage.

But if the objection, as to the consent of the husband, was wholly removed, still there is the lack of the ingredient mentioned by the chief justice in *Fowler v. Shearer*, that there should be a recital in the separate deed of the wife, that the release is in consideration of the sale. This is not a merely formal clause, but is introduced as the record proof that she joins in the sale with her husband, so as to bring the case within the proviso of the statute, such a recital being conclusive of such a joinder. But it is said that in point of fact the consideration of \$200 was not paid, although so stated in the release; and, at all events, parol evidence is admissible to show the auxiliary and real consideration. It appears to me that, in this case, the parties are not at liberty to deny that the consideration money stated in the deed was actually paid, or constituted the foundation of the release. Parol evidence is generally inadmissible to contradict the statements contained in a deed; and this very

point, as to the consideration, has been directly adjudged to fall within the rule. Shep. Touch., 222, 510; Wilkes v. Leuson, Dyer, 169*a*; Fisher v. Smith, Moore, 569; Smith & Lane's Case, 1 Leon, 170; Mildmay's Case, 1 Co., 176; Bac. Abr., Bargain & Sale, D.; Lord Cromwell's Case, 1 Co., 70; Bedle's Case, 7 Co., 39; Com. Dig., Bargain & Sale, B., 11; Wilt v. Franklin, 1 Binn., 502; Milburn v. Salkeld, Willes, 673; Stevens v. Cooper, 1 Johns. Ch., 425; Botsford v. Burr, 2 Johns. Ch., 405, 415.

Indeed, in some cases a distinction prevailed that excluded all parol evidence to establish any consideration consistent with but additional to that expressed in the deed, unless in cases where the deed purported also to be *for other considerations*. Lord Hardwicke in Peacock v. Monk, 1 Ves., 190, recognized that distinction. In that case evidence was offered of a consideration *aliunde* the deed. His lordship admitted it, because there was no consideration expressed in the deed, saying, "to be sure, where any consideration is mentioned, as love and affection only, if it is not said also, *and for other considerations*, you cannot enter into proof of any other; the reason is, because it would be contrary to the deed; for when the deed says it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other. But this is a middle case, there being no consideration at all in the deed." The master of the rolls, in Clarkson v. Hanway, 2 P. Will., 203, manifestly inclined to the same opinion. Sheppard's Touchstone (222, 510) contains the elements of a like distinction; and it has been enforced on various occasions by the supreme court of New York, without hesitation. Howes v. Barker, 3 Johns., 506; Schermerhorn v. Vanderheyden, 1 Johns., 139; Maigley v. Hauer, 7 Johns., 341. The solid influence of these authorities cannot be overlooked; and if they stood alone they would be decisive. But they are encountered by weighty opinions in an opposite direction. The point arose in Villers v. Beaumont, 2 Dyer, 146, and was decided in favor of the admission of the parol evidence, notwithstanding the omission in the deed of *other considerations*, by three judges against one. The correctness of that decision was recognized in Bedle's Case, 7 Co., 40, and in Vernon's Case, 4 Co., 3. Lord Chief Justice Willes has given it the sanction of his own great authority in Doe v. Salkeld, Willes, 673; and Lord Kenyon and the court of king's bench acted upon it in Rex v. Scammonden, 3 Term, R., 474. The preponderance of authority is, therefore, perhaps, in favor of the admissibility of the evidence.

Assuming it to be so, still, as the parties are estopped to deny the consideration stated in the deed, the prior sale cannot be admitted to be the sole consideration. How then can the release be deemed a joining in the original sale, since it stands on the footing of a new auxiliary consideration? How can we infer that it was a part of the original contract of sale when it purports to be a distinct transaction? There is no parol proof of any admission by the wife that she originally agreed to join in the sale. The whole inference rests upon the fact that she agreed in August to execute the deed, upon being told by a witness that it was necessary to complete the title.

I confess myself unwilling to take another step involving a plain departure from the language of the statute; and the danger of admitting parol proof to support the infirmity of deeds is a good deal strengthened by the knowledge that married women are not often sufficiently well acquainted with the practical business of life to guard themselves from mistake or imposition. If the supreme court of the state had sustained such a release, I should have followed them upon a point of local law. As they have not, I stand upon the text of the statute.

But it is urged that this is a case in equity, and that the court will grant great indulgences to the imperfect acts of parties to sustain their intentions; and that it will not lend its aid to enforce any inequitable claim. But in a case like the present, equity necessarily follows the law. The parties stand upon their legal rights, and what is not a bar of dower at law ought not, under the circumstances of this case, to be held a bar in equity. Here, no fraud or imposition is set up. The case stands upon its naked rights; and the relief asked is not rebutted by any counter equity against Mrs. Powell.

Another question of a different sort arises from the following transaction: In July, 1813, David L. Shields conveyed to Roswell Merrick, in fee, a lot of four acres, for the consideration of \$120. At the time of this purchase, Merrick was in partnership with one George N. Pearse, under the firm of Merrick, Pearse & Co. Merrick gave his own note for the purchase money, but it was paid out of the partnership fund. Immediately after the purchase the lot was divided, and Merrick occupied and built a house upon the southern half; and his possession remained ever afterwards, several and exclusive in the premises. The firm became insolvent in 1816, and Pearse then absconded, and, being in bad habits, he enlisted in the army, and has never since been heard of; and his papers have been lost or destroyed. There is no positive proof that any conveyance was ever made of the northern half by Merrick to Pearse. But the answer (after disclaiming on the part of the defendants any interest in the southern half) sets up the purchase as an original purchase, jointly for account of Merrick & Pearse, and that therefore there was a resulting trust in the one half for the use of Pearse, so that Mrs. Powell is not dowable of it, it being a mere trust estate in her husband. Supposing parol evidence to be admissible to prove the joint purchase, it appears to me that the fact is made out in the most satisfactory manner. The original bargain is stated by the vendor to have been made by both partners, and admitted by them to have been on joint account, and the consideration was paid out of the joint funds.

The objection taken at the bar is, that parol evidence is not admissible to establish the trust, because it trenches upon the statute of frauds of Massachusetts. That statute (Act of 1783, ch. 37, § 3) is, on this subject, in substance a transcript of the statute of 29 Charles 2d, ch. 3, and excepts from its operation any conveyance "by which a trust or confidence shall or may result by the implication or construction of law, or be transferred or extinguished by an act or operation of law."

The objection is certainly not without countenance from highly respectable elementary writers. Mr. Roberts (Frauds, b. 1, ch. 2, p. 95, note 39) and Mr. Saunders (Saunders' Note to Lloyd v. Spillet, 2 Atk., 150; Saunders on Uses, etc., ch. 3, § 5, p. 212) appear to have been strongly impressed with the notion of the general inadmissibility of parol evidence to raise a trust in cases of this nature. The latter contends that, at all events, it is inadmissible after the death of the nominal purchaser. And Mr. Sugden (Sugden on Vendors, 414), although he is in favor of its admissibility generally, doubts if it can be admitted where the answer of the supposed trustee denies this trust.

§ 485. *If a joint purchase be made in the name of one of two co-purchasers, parol evidence is admissible to prove the fact, and the co-purchaser in whose name the property stands is held to be a trustee of a moiety for the other.*

The general principle has long since been settled in equity, that if one person purchase land in the name of another, the latter, the deed being taken in his name, shall, without any declaration in writing, be held a trustee of the

former. The ground of this doctrine is, that he who pays the consideration is to be deemed the owner of the land in equity, unless other presumptions arise (as may from the consanguinity of the parties) to repel the conclusion. And it was decided in a very short time after the passing of the statute of frauds of 29 Charles 2d, in an anonymous case in 2 Vent., 361, that this was a resulting trust and not within the purview of that statute. The doctrine of this case has never been departed from, but has been recognized in a great variety of decisions. *Ambrose v. Ambrose*, 1 P. Will., 322; *Kirk v. Webb*, Prec. Ch., 84; *Ex parte Vernon*, 2 P. Will., 548; *O'Hara v. O'Neil*, 21 Vin. Abr., Trust, E., pl. 6, note; *Pelly v. Maddin*, 21 Vin. E., pl. 15; *Smith v. Baker*, 1 Atk., 385; *Ryall v. Ryall*, 1 Atk., 59; S. C., Amb., 413; 1 Eq. Abr., 232, p. 7; *Lane v. Dighton*, Amb., 409; *Withers v. Withers*, Amb., 151; *Smith v. Camelford*, 2 Ves. Jr., 699, 713; *Lloyd v. Spillet*, 2 Atk., 150; *Willis v. Willis*, 2 Atk., 71; *Lever v. Andrews*, 7 Bro. Parl. Cas. (Tomlins), 288; *Knight v. Pechey*, 1 Dick., 327; *Bartlett v. Pickersgill*, 4 East, 577, note; S. C., 1 Eden, 515; 1 Cox, 15; Fonbl. Eq., b. 2, ch. 5, § 1, p. 116, and note; *Rider v. Kidder*, 10 Ves., 360; *Young v. Peachy*, 2 Atk., 256; *Crop v. Norton*, 2 Atk., 74; S. C., 9 Mod., 233; *Finch v. Finch*, 15 Ves., 50; Bac. Abr., Uses and Trusts, I, ch. 3; Woodeson, 439. But the point, whether proof of such a purchase could be made out by evidence *aliunde* the deed, or other written evidence, or, in other words, whether parol evidence is admissible to establish the manner of paying the purchase money, has been involved in some doubt. Some of the earlier cases, such as *Kirk v. Webb*, Prec. Ch., 84; *Newton v. Preston*, Prec. Ch., 103, and *Skett v. Whitmore*, 2 Freem., 280, appear rather to lean against it. But the more recent authorities have gradually settled in its favor. On the present occasion I have examined the subject at large, and am not aware that any important case has escaped my researches. The result of that examination is, that the question is no longer fairly open to debate; and whatever difficulty I should have had in the first instance in adopting the rule, it appears to me now firmly established that parol evidence is admissible to ascertain the trust. I should have gone somewhat into a commentary upon the leading cases, tracing them in their historical order, if that excellent and laborious judge, Mr. Chancellor Kent, had not in two recent cases, *Boyd v. McLean*, 1 Johns. Ch., 582, and *Botsford v. Burr*, 2 Johns. Ch., 405, with great care and accuracy, collected and reviewed them. I have followed in his path, and find nothing to subtract from, and nothing to add to what he has stated as the result of his investigation, with which my own entirely coincides. The same doctrine has been maintained on various occasions by the supreme court of New York (*Jackson v. Sternberg*, 1 Johns. Cas., 153; *Foot v. Colvin*, 3 Johns., 216; *Steere v. Steere*, 5 Johns. Ch., 1, 19; *Jackson v. Matsdorf*, 11 Johns., 91; *Jackson v. Morse*, 16 Johns., 197; *Jackson v. Mills*, 13 Johns., 463), and of Pennsylvania (*German v. Gabbald*, 3 Binn., 302; *Gregory v. Setter*, 1 Dall., 193); and although there is a *dictum* in the case of *The Northampton Bank v. Whiting*, 12 Mass., 106, 109, which appears to limit the rule to the admission of parol evidence, where it is not inconsistent with the deed, that is, where the consideration is not stated in the deed to have been paid by the nominal purchasers, I persuade myself that if all the authorities had been brought under the review of the court, the general conclusion would not have differed from that of Mr. Chancellor Kent. See *Gascoigne v. Thwing*, 1 Vern., 366; S. C., 1 Eq. Abr., 232; *Willis v. Willis*, 2 Atk., 71; *Knight v. Peachy*, 1 Dick., 327; *Bartlett v. Pickersgill*, 4 East, 577, note; S. C., 1 Eden, 515; 1 Cox, 15; *Ryall v. Ryall*, 1 Atk.,

59; *Lane v. Dighton*, Amb., 409; *Ex parte Vernon*, 2 P. Wm., 548; *Sowden v. Sowden*, 1 Bro. Ch., 582; *Rider v. Kidder*, 10 Ves., 360; *Lench v. Lench*, 10 Ves., 511; *Finch v. Finch*, 15 Ves., 50; *Mackreth v. Symons*, 15 Ves., 360; *Wray v. Steele*, 2 Ves. & B., 388; *Taylor v. Plumer*, 3 Maule & Sel., 562, 579; 3 Woodes, 439. The latest English authorities seem to leave the point entirely at rest, and I have not the courage to undertake to disturb it.

Supposing this point out of the case, there is another connected with it that requires observation; and that is, whether the doctrine, however true as to an entire, applies to a joint purchase. Lord Hardwicke is represented in *Crop v. Norton*, reported in 2 Atk., 74, and more fully if not more accurately in 9 Mod., 233, to have said, "Where a purchase is made, and the purchase money is paid by one, and the conveyance taken in the name of another, there is a resulting trust for the person who paid the consideration; but this is where the *whole* consideration moved from such person; but I never knew it, where the consideration moved from several persons, for this would introduce all the mischiefs which the statute of frauds was intended to prevent. Suppose several persons agree to purchase an estate in the name of one, and the purchase money appears by the deed to be paid by him only, I do not know any case where such persons shall come into this court and say they paid the purchase money; but it is expected there should be a declaration of trust."

In *Wray v. Steele*, 2 Ves. & B., 389, the vice-chancellor said, "Lord Hardwicke could not have used the language ascribed to him. What is there applicable to an advance by a single individual, that is not equally applicable to a joint advance under similar circumstances?" And in that case, which was of a joint purchase in the name of one, he overruled the distinction, and decreed in favor of the trust. I follow this authority from the persuasion that it is perfectly within the principle of the general doctrine.

§ 486. *No dower in estate of which husband is trustee.*

The remaining inquiry under this head is, it being established that this was a joint purchase in trust as to the northern half for Pearse, whether dower lies of such an estate in favor of the wife of the trustee. In *Noel v. Jevon*, 2 Freem., 43, that point was decided against the right of dower, notwithstanding the opinion in *Nash v. Preston*, Cro. Car., 191, and it was then said to be the constant practice of the court. See, also, *Roper*, Law of Husband and Wife, p. 353; *Bevant v. Pope*, 2 Freem., 71. *Contra*, 1 Roll. Abr., 678, pl. 36. This was a suit in equity, and would be decisive in this court, whatever might be the course of proceeding in a court of law; though I presume even at law in Massachusetts, there being no state court of equity, the doctrine would be fully recognized. Upon the whole, upon this point, my opinion is that Mrs. Powell has no claim of dower in the northern half of the four acre lot.

§ 487. *Valuation and the time of computing it when assignment of dower is made after the purchaser has improved.*

There is another question of great practical importance in all cases of this nature; I mean whether dower is to be assigned to the widow according to the value at the time of the alienation of her husband, or at the time of the assignment of the dower. This is a point upon which there has been a good deal of argument at the bar, and upon which the American authorities are not agreed. It is necessary, therefore, to give it a fuller discussion than might otherwise seem necessary.

In *Coke on Littleton* (32a), it is laid down, "that if the wife be entitled to have dower of three acres of *marsh*, every acre of the value of twelve pence,

and the *heir*, by his industry and charge, maketh it good *meadow*, every acre of the value of ten shillings, the wife shall have her dower of the improved value, and not according to the value as it was in the husband's time; for her title is to the quantity of the land, viz., one just third part. And the like law it is, if the *heir* improve the value of the land by building; and on the other side, if the value be impaired in the time of the heir, she shall be endowed according to the value at the time of the assignment, and not according to the value in the time of her husband." The learned author quotes no authority for these positions, except a case in 30 Edw. 1, reported in Fitzherbert's Abr., title Voucher, 298. The report is very short and obscure, but it seems to have been a case of dower where the widow demanded a *place*, which, at the time her husband sold it, was without a dwelling-house; but she demanded dower of the one-third of the *messuage*, or of the value against the heir who was vouched. The case was put, if the husband sells a site and afterwards the purchaser builds a castle on it, whether she should have dower of the third part of the castle, and it was denied. And thereupon it is said, that by the award of the court she recovered the third part of the *place* (*de la place*). Mr. Hargrave gives from the manuscripts of Lord Hale the following note on the passage (*note* 193). "*Vide* 1 Hen. 5, 11; 17 Edw. 3. If feoffee improves by building, yet dower shall be as it was in the seizin of the husband. 17 Hen. 3, Dower, 192; 31 Ed. 1, Voucher, 288. For the heir is not bound to warrant, except according to the value as it was at the time of the feoffment, and so the wife would recover more against the feoffee than he could recover in value, which is not reasonable."

The case 1 Hen. 5, 11, does not appear to me, on examining it in the year books, to have any application. The principal point there litigated was upon special pleading, the widow demanding dower of two mills, and the tenant pleading in abatement that at the purchase of the mill it was two tofts only on which the parties were at issue. The citation, 17 Edw. 3, has escaped my researches. The case of 17 Henry 3 is taken from the report in Fitzherbert's Abr., title Dower, 192; and that of 31 Edw. 1, from the same work, title Voucher, 288. The former stands thus: "E., who was the wife of R., demands one-third part of three acres of land with the appurtenances in E., as her dower, against W. And W. comes and says that he bought the land of her husband, naked, and unbuilt upon, and he built upon it; and he willingly allows to her her third part, saving the buildings to himself. And, therefore, she had her seizin, saving to the said W. the houses built by him, etc., because he had, *without the buildings*, where she might have her land, etc." The other stands thus: "Dower and demand of the third part of a mill, and the tenant vouches, and the vouchee comes and demands what he had to bind him, and the tenant shows a charter conveying a certain place; upon which the voucher demands judgment, if he ought to warrant; the tenant says, that after the gift he built a mill; judgment if of such he ought not to be warranted; and the case was, that in the seizin of the husband the place was but a vacant place. Here: He might have abated the writ. Hingham: You ought to have discovered the matter when you vouched, and it was not done, for which award, etc."

These cases seem in substance to support Lord Hale's position, and establish a distinction between the case of the heir and a purchaser, in favor of the latter. Perkins (Dower, § 328; Bacon, Abr., Dower, B., 5) recognizes the distinction, and puts the case, where there are buildings on the land at the time

of the alienation of the husband, and afterwards during the life of the husband the feoffee pulls down the buildings; and he holds that the wife shall, in such case, have dower only according to the value of the land as it was at the death of her husband; and he doubts if she has any remedy for the taking away of the buildings, because her title to dower is not consummate before his death. Dower, § 329. It has been said in some modern cases (*Thompson v. Morrow*, 5 Serg. & R., 289, 291), that the reason why, when the heir builds upon, or otherwise improves, the estate, the widow shall have her dower of the improvements, is, because it is his folly to make the improvements before assigning her dower. This may be the true reason, but neither my Lord Coke, nor, as far as I can trace, do any of the old authorities assign this as the ground of the rule. And if it be, how does it happen that if the heir impairs the value, still her dower is only of the value at the time of the assignment, thus permitting him to derive benefit from his folly or his wrong. If I were allowed to hazard a conjecture, it would be that the rule proceeded upon grounds somewhat more artificial and technical. In case of a disseizin, if the disseizor build upon the land which he hath by disseizin, and the disseizee afterwards enter, the latter shall have the buildings as well as the land. The reason is, that the title and seizin of the soil, upon recovery by the common law, carry everything annexed to the freehold as an incident; *cujus est solum, ejus est usque ad cælum*. The title to dower is consummate by the husband's death of all things of which he had a seizin, and which were then in existence. The tenant in dower, therefore, like any other tenant of the freehold, takes upon a recovery whatever is then annexed to the freehold, whether it be so by folly, by mistake, or by the purest innocence. If a recovery be upon a title paramount against any person, though he may be a *bona fide* purchaser, and have made improvements on the land, yet the common law gives the demandant a perfect title to all the improvements, as well as to the land. And if in the hands of such a purchaser the lands are deteriorated, still the recovery is confined to the land in its actual state at the time of the recovery, for at the common law no damages were given in real actions.

It is true that, in the case of the heir, he is in by descent, and so his possession, being cast upon him by the law, may seem rightful; but when the wife is endowed upon a recovery from the heir and assignment of dower, she is in from the death of her husband, and the heir's possession is avoided, and by consequence, there is no right of possession as to this third part acquired to the heir, since the law doth not place him in such third part after the death of the father. Gilbert's Tenures, 26, 27; Litt., §§ 393, 394. The rule, therefore, that subjected the improvements as well as the land in the possession of the heir to the claim of dower, seems a natural result of the general principles of the common law, which gave the improvements to the owner of the soil. See Bacon, Abr., Dower, B., 5.

It is not quite so easy to ascertain upon what ground the exception in favor of purchasers was first admitted to prevail. The reason assigned in Lord Hale's manuscripts, already cited (for it is not assigned in the year books), is not, as Mr. Chief Justice Tilghman (*Thompson v. Morrow*, 5 Serg. & R., 289) has with great force and acuteness shown, a satisfactory reason. Admitting what is certainly true, that upon a feoffment with warranty the heir is not bound to warrant, if he specially show the matter, except according to the value of the land at the time of the feoffment (*Jenkins, Cent.*, 34, 35, case 68. The citation there of 47 Edw. 3, 22, seems a mistake; 19 Hen. 6, 46; 46 Edw.

3, 286; *Godbolt*, 151; *Pitcher v. Livingston*, 4 Johns., 1), this establishes no more than that a covenant of warranty, in construction of law, extends only to the recovery of such value. It does not touch the point whether any contract between third persons ought to prejudice the right of dower, or whether the tenant in dower ought to be abridged of the general rights which attach to other persons entitled to the freehold. If there be no warranty upon the alienation, there is no pretense to say that that fact could operate as a just bar to dower, because the feoffee could not recover over. How then can the case be varied by the fact that there is a warranty to a limited extent and value? Nor can the exception be explained by considering the improvements as not falling within the dowable estate, not being part of any lands or tenements which were the husband's at any time during the coverture, for that is equally true of improvements by the heir. I do not find that in respect to purchasers any distinction is admitted, whether the improvements are made with or without notice of the right to dower, or before or after the husband's death. See 1 *Roper on Property of Husband and Wife*, 346. And yet if the improvements are made after the husband's death with knowledge of the right of dower, it is as much the folly of the purchaser to build without assigning dower, as it would be of the heir. The only difference is that the heir must be presumed to know whether there are other lands sufficient for the dower; the purchaser may not.

The rule may have originated, as has been supposed (*Gore v. Brazier*, 3 Mass., 538, 544; *Thompson v. Morrow*, 5 Serg. & R., 289), in the policy of promoting the prosperity of the country by encouraging improvements in agriculture and building; though so wise and philosophical a spirit seems scarcely to belong to so early an age, fettered with feudal tenures and military services. The anxiety to promote alienations and subinfeudations, and thus to disentangle inheritances from some of their numerous burthens, may have induced the courts to adopt the rule, as founded in general justice. Be this as it may, it is now admitted to constitute a fixed maxim of the common law; and in all the American cases in which it has been brought into controversy, its obligatory force has been fully established. The decisions (*Gore v. Brazier*, 3 Mass., 544; *Libbey v. Swett*, Story's Plead., 365, note; *Catlin v. Ware*, 9 Mass., 218; *Ayer v. Spring*, 9 Mass., 8; S. C., 10 Mass., 80) in the supreme court of Massachusetts are directly in point. I have no difficulty, therefore, in affirming that by the local law the dower must be assigned to the widow, exclusive of any improvements made by the purchasers since the alienation.

But the next point is whether, excluding the improvements on the land, the dower is to be assigned according to its present value, or that at the time of the alienation; or, in other words, whether the dowress or the tenant is now to have the benefit of any enhanced value of the land, between the alienation and the assignment of dower, arising from the general progress and population of the country. In *Gore v. Brazier*, 3 Mass., 544, Mr. Chief Justice Parsons said: "If the husband, during the coverture, had aliened a real estate in a commercial town, and at his death the rents had trebled from various causes unconnected with any improvements of the estate, and the widow should then sue for her dower, perhaps it would be difficult for the purchaser to maintain that one-ninth only, and not one-third part, should be assigned to her." The counsel on both sides quote this language as decisive in their favor. On the one hand it is said that the expression, "unconnected with any improvements of the estate," demonstrates that any increase of value which results to the

land from the existence and proximity of the improvements (as, in the present case, by the establishment of a flourishing manufactory) is to be excluded from the dower, as well as the improvements themselves. On the other hand it is said that the learned judge did not intend any such thing. He meant merely to distinguish generally between the increase of value from the improvements, and from general causes, without entering into the consideration how far those improvements may have collaterally increased the value of the land. It would be unjust to the memory of the learned judge to give to any language used by him in a case not before him, and introduced merely by way of argument, any more authority than what belongs to a *dictum* expressing a general truth. I am not quite satisfied that a case like that now presented was then in his mind; a case where the erection of a manufacturing establishment on the premises has given an increased value to all the land in the neighborhood; a value which does not grow out of the mere erection, but out of the nature of the employment, and the capital connected with it. If a dwelling-house of the like extent had been erected the value would not have been materially enhanced. If the manufacture of cloths were now discontinued, there would be an immediate and serious diminution of value.

In the case of *Libbey v. Swett*, decided in 1804 (Story's Plead., 365, note), with a manuscript copy of which I was favored by the late Mr. Chief Justice Sewall, the only point was, whether the widow was entitled to dower of the mills newly erected by the alienee, the other part of the premises remaining in the same state as before the alienation. In *Catlin v. Ware*, 9 Mass., 218, the land had been improved by ditching, making walls, and erecting and repairing buildings, and the court held that the widow was "entitled to her third part of the land in the condition it was in at the time of the alienation by her husband." The same point was subsequently ruled in *Ayer v. Spring*, 9 Mass., 8; S. C., 10 Mass., 80. In neither of these cases did the precise question arise, whether, if the land was enhanced in value by causes unconnected with the direct improvements by the alienee, since the alienation, that value was to be excluded in the assignment of dower. Nor does the more difficult question appear to have been presented in the argument, whether an increased value of the unimproved part of the land, arising collaterally from improvements on another part of the land, varies the claim of dower. Suppose a farm of one hundred acres, on one acre of which a manufacturing establishment is erected, and this gives an enhanced value to the remaining ninety-nine acres of thirty-three and one-third per cent., is the dower to be reduced one-third on the ninety-nine acres, or is it to be of one-third of the ninety-nine acres, and of such portion of the other acre as is equal to its value deducting the improvement?

In *Humphrey v. Phinney*, 2 Johns., 484, the supreme court of New York decided that dower was to be assigned according to the value of the land at the time of the alienation by the husband, and not according to its improved value at the time of the assignment. But there, upon the special pleadings, the only point seems to have been whether dower should be of improvements made upon the land by the alienee. The court founded itself upon a statute of the state, which was construed to restrain the dower to the value at the alienation, but at the same time asserted that the same was the rule of the common law. In *Dorchester v. Coventry*, 11 Johns., 510, the point as to the increased value of the land, independently of the improvements, was distinctly considered, and the court decided that the dower was to be of the

value of the land at the time of the alienation, and that the legislature did not intend to make any distinction between improvements and the increased value of the land. This doctrine was again followed in *Shaw v. White*, 13 Johns., 179, where the conveyance was of new and unimproved lands, which had been highly improved by the purchaser. In *Hale v. James*, 6 Johns. Ch., 258, the same question arose before Mr. Chancellor Kent upon a somewhat different state of facts, for, independently of the improvements, the land had diminished in value since the alienation. That learned judge went again elaborately into the doctrine, and adhered to the rule already laid down, viz.: the value of the land at the time of the alienation, acting upon it as a clear rule of the common law. With the most profound respect for so great a judge, I must be permitted to doubt if there be any such doctrine in the common law. The authorities referred to do not (though Mr. Roper in his late work thinks otherwise, 1 Roper, *Law of Husb. & Wife*, ch. 9, § 2, pp. 3, 346, 347), in my humble judgment, warrant the conclusion. It is true that Perkins (§ 328) states that where the alienee of the land hath made improvements "the wife shall not have dower, but according to the value it was *at in the time of the husband*;" and for this he cites Fitzherbert, *Dower*, 192, already quoted. But in that case the widow had dower of the land, saving to the alienee the houses built by him, as there was land enough for it without touching them. And probably Perkins had no reference in this paragraph to any increase of value except by the buildings. The language from Lord Hale's manuscripts admits of the same interpretation; and he relies upon no other authorities than those which have been already commented on.

It is a great consolation to me to find my own views of the doctrine supported by the high authority of Mr. Chief Justice Tilghman; and I should have been spared some research if his very learned judgment in *Thompson v. Morrow*, 5 Serg. & R., 289, had earlier fallen under my observation. I entirely accede to the general reasoning by which he supports his opinion, and have nothing to add to what he has, with so much accuracy and clearness, collected. In his own language I can state that "with respect to dower I have found no adjudged case in the year books confining the widow to the value at the time of the alienation by her husband, where the question did not arise *on improvements made after the alienation*; and that having considered all the authorities which bear upon the question, I find myself at liberty to decide according to what appears to me to be the reason and the justice of the case, which is *that the widow shall take no advantage of the improvements of any kind made by the purchaser*, but, throwing those out of the estimate, she shall be endowed according to the value at the time her dower shall be assigned to her." This doctrine appears to me to stand upon solid principles and the general analogies of the law. If the land has, in the intermediate period, risen in value, she receives the benefit; if it has depreciated, she sustains the loss. Her title is consummate by her husband's death, and, in the language of Lord Coke, that "title is to the quantity of the land, viz., one just third part." If, on the other hand, the value of the land has increased solely from the improvements made upon it, and without those improvements it would have remained of the same value as at the time of the alienation, the old value, and not the improved value, is to be taken into consideration. For practical purposes, it is impossible to make any distinction between the value of the improvements and the value resulting from the improvements; between improvements which operate on a part of the land and those which operate upon the whole.

Upon the whole, my judgment is that the dower must be adjudged according to the value of the land in controversy at the time of the assignment, excluding all the increased value from the improvements actually made upon the premises by the alienees; leaving to the dowress the full benefit of any increase of value arising from circumstances unconnected with those improvements.

POWELL v. MONSON & BRIMFIELD MANUFACTURING COMPANY.

(Circuit Court for Massachusetts: 8 Mason, 459-469. 1824.)

Opinion by STORY, J.

STATEMENT OF FACTS.—In October, 1808, Rosewell Merrick mortgaged the estate in controversy to Rufus Flint. Subsequently, in 1812, he made such an alienation as completely to part with his estate in the equity, so far as dower is concerned. In the intermediate time he made great improvements on the estate, the dower in which is claimed, and forms the present subject of contestation. He died in 1819; and afterwards, in April, 1820, Rufus Flint took possession of the mortgaged premises under process of law; and his interest therein, by mesne conveyances, has since come to the Brimfield Manufacturing Company.

The first exception presents the question whether the mortgage constitutes such an alienation of the husband as by law estops the right of dower in any subsequent improvements made by the husband upon the estate before an entry or foreclosure under the mortgage. I say in improvements by the husband, for the point does not arise as to improvements made by the mortgagee. This question must be settled by the local law of Massachusetts, although material lights may be borrowed from other sources to illustrate the doctrines of the common law, so far as they have been adopted here.

It is very clear that at common law a widow is not entitled to dower in any equity of redemption belonging to her husband during the coverture. This doctrine resulted from the principle that, by the mortgage, the whole legal estate and seizin were gone from her husband, and that dower could not arise, except in cases where the husband had a legal seizin of the estate at some time during the coverture. Co. Litt., 31 to 33; Litt., § 36. Courts of equity in this respect followed the rule at law, and refused to create an equitable title to dower, where a legal title was denied to exist. *Dixon v. Saville*, 1 Bro. Ch., 325; *D'Arcy v. Blake*, 2 Sch. & Lef., 387; *Titus v. Neilson*, 5 Johns. Ch., 453, 454. But this has always been considered a hard and harsh rule, and against the general spirit prevailing in the construction of mortgages. In the state of New York an early struggle commenced, and the doctrine finally prevailed, that, at law, the mortgagor in possession was to be considered as seized at law of the estate for all purposes, except as against the mortgagee and those claiming under him; and that his wife was dowable of an equity of redemption in fee. *Titus v. Neilson*, 5 Johns. Ch., 453, and cases there cited. The same doctrine has been successfully and conclusively established in Massachusetts. The mortgagor is here considered as the real owner in seizin of the estate against all persons but the mortgagee and persons claiming under him. If dispossessed by a stranger he may maintain a writ of entry *sur disseizin*; and a purchaser of the equity either from him, or under an execution, acquires a like legal seizin, and may maintain a like writ. *Groton v. Boxborough*, 6 Mass., 50; *Wellington v. Gale*, 7 Mass., 138; *Goodwin v. Richardson*, 11 Mass.,

469; *Wilder v. Houghton*, 1 Pick., 88. The very point, that a widow is dowable of an equity of redemption against every person not claiming under a prior mortgage, was decided in *Snow v. Stevens*, 15 Mass., 278, and was subsequently recognized in *Barker v. Parker*, 17 Mass., 564. The latter case was a very strong application of the doctrine, for the wife had joined in the mortgage, and afterwards the husband's equity was sold by process of law, and before the purchaser had redeemed the mortgage was discharged by a third person; and it was held that the wife was thereby let in to dower against the purchaser of the equity.

§ 488. *Widow not estopped to claim dower by a mortgage by the husband alone.*

The present, however, is not the case of a widow claiming dower of an equity of redemption. Her husband was seized of the estate during the coverture, and afterwards mortgaged the estate to Flint, in which she did not join. She is, of course, as has been already decided, entitled to dower in the premises; and the question is as to the improvements made after the mortgage. As against the heirs of her husband, she would unquestionably be dowable of the improvements, for she would be dowable even of improvements made by the heir himself. If the mortgage had been redeemed, she would have been so entitled. See *Hilderth v. Jones*, 13 Mass., 525; *Bolton v. Ballard*, 13 Mass., 227; *Snow v. Stevens*, 15 Mass., 278. What reason is there why she should not be entitled as against the mortgagee? The improvements were not made by him; and he has, therefore, no equity in that respect. If it be said that the improvements, being made after the mortgage, attached to the estate of the mortgagee for his benefit, it may with as much truth be stated that the wife also had an inchoate right of dower, to which as an accruing benefit they ought to attach. But I put the case upon this, that here there was not, in the sense of our law, an absolute alienation of the estate by the husband until after these improvements were made. A mortgage is not an absolute alienation. In *Goodwin v. Richardson*, 11 Mass., 469, 473, the court said that "the foreclosure [of a mortgage] operates as a new purchase by the mortgagee." See, also, *Ex parte Quincy*, 1 Atk., 477. If by such foreclosure the title is to be considered as relating back to the time of the original mortgage, it is so in a limited extent, and not to cut out the rights of third persons. And it would require great consideration before it could be decided that if, after the foreclosure, the title to the estate had failed by an ouster under a superior title, the mortgagee, upon the covenants of warranty in the mortgage, could have recovered damages to the full value of the improvements made afterwards by the mortgagor.

§ 489. *A widow is entitled to dower in improvements made upon her husband's property, although mortgaged, except where made by purchaser after alienation.*

There is no case in which it has been held that the widow is excluded from dower in improvements unless made by a purchaser after an alienation. The court is now called upon to go beyond that exception without any peculiar equity to justify it. I cannot but consider that all the improvements made by the husband are to be considered as made for the benefit of the estate and of all persons having an interest therein and according to such interest. These improvements were annexed to the freehold, and became a part of it to all intents and purposes. If a recovery had been had under a superior title, they would have passed to the recoverer. The title of the dowress is superior to

that of the mortgagee in the premises; and I know of no rule of law that restrains her from taking her third part of the freehold with all the improvements on it antecedent to the alienation of the husband in 1812. The same point came before my learned friend Mr. Chancellor Kent in *Hale v. James*, 1 Johns. Ch., 258, and was by his cautious judgment decided in the same way; and I derive no small confirmation of my opinion from finding it coincide with his. The report of the commissioners on this point must be confirmed.

§ 490. *Rule of fixtures stated. The water-wheel and mill-gearing of a factory are a part of the realty, and the right of dower attaches.*

The other exception presents the question whether the water-wheel and mill-gearing of the factory, without which it cannot be put in operation, are fixtures annexed to the freehold, and so real estate, or are to be deemed mere personalty. The general rule undoubtedly is, that whatever is once annexed to the freehold becomes parcel thereof, and cannot be afterwards severed but by him who is entitled to the inheritance. Therefore it is laid down in Co. Lit., 53a, that if glass windows, though glazed by the *tenant himself*, be broken down or carried away, it is waste, for the glass is part of the house. And so it is of wainscot, benches, doors, windows, furnaces, and the like, annexed or fixed to the house, either by him in the reversion or the tenant. The same doctrine is laid down by Lord Coke in the close of *Herlakender's Case*, 4 Co., 63, where he refers to a case, then recently decided, in which it was held that waste might be committed in glass annexed to windows, for it is parcel of the inheritance, and shall descend, as such, to the heir, and the executors shall not have them; and although the lessee himself, at his own costs, put the glass into the windows, yet, being once parcel of the house, he could not take it away or waste it. It was likewise then resolved that wainscot, be it annexed to the house by the lessor or lessee, is parcel of the house; and there is no difference in law if it be fastened by great nails or little nails, or by screws or irons put through the post or walls. The like was adjudged in *Cooke's Case*, Moore, 177, where a tenant took away doors and cheek posts of a house, which he had added during his tenancy. Indeed, the doctrine is to be found in the year books. In 17 Edw. 2, 518, it was held waste for a tenant to pull down a house erected by him during the term. In 20 Hen. 7, 13, b, and 21 Hen. 7, 26, b, 27, a (which I incline to think different reports of the same case), it was decided that a furnace erected by the ancestor in his house was parcel of the inheritance, and passed to the heir and not to the executor, and that the same rule would apply where the ancestor had fixed vats in a brew-house or dye-house. Kingsmil, J., on that occasion, said that, after it was once fixed to the freehold, it was incident to the freehold, so that it was parcel thereof, and would go and pass at all times with the freehold. This doctrine is fully recognized by Lord Chief Baron Comyns in his *Digest* (Biens, B.), who lays it down (which is very applicable to the present case) that mill-stones fixed to a mill belong to the heir and not to the executor. It is also recognized by the lord chancellor in *Cave v. Cave*, 2 Vern., 508, and by Lord Mansfield in *Lawton v. Salmon*, 1 H. Bl., 259, note, who applied it in favor of the heir as to salt-pans which were fixed in salt-works by the ancestor, and fastened by mortar to a brick floor. Indeed, as between heir and executor, the rule has never been relaxed, unless the case of the cider-mill, cited in *Lawton v. Lawton*, 3 Atk., 13, is an exception, which may, perhaps, as the note there suggests, have turned upon a custom, or, as Lord Ellenborough, in *Elwes v. Maw*, 3 East, 38,

considers it, may be deemed a mixed case between enjoying the profits of land and carrying on a species of trade.

In modern times a relaxation has, indeed, taken place in cases between tenant for life and remainder-man, and still more favorably in cases between landlord and tenant for the benefit of trade. The authorities are most ably summed up and commented on by Lord Ellenborough in *Elves v. Maw*, 3 East, 38, and it would be a useless labor to review them. See, also, *Shepp. Touch.*, 470; 3 Dane, Abr., 147, 153; *Woodfall, Landlord and Tenant*, ch. 9, § 1; *Buller, N. P.*, 34; *Toller's Ex'rs*, B. 2, ch. 4, § 2; *Holmes v. Tremper*, 20 Johns., 29; *Lawton v. Lawton*, 3 Atk., 13; *Dudley v. Warde, Amb.*, 113; *Beck v. Rebow*, 1 P. Will., 94; *Ex parte Quincy*, 1 Atk., 477; *Penton v. Robart*, 2 East, 88; *Poole's Case*, 1 Salk., 368; *Lee v. Risdon*, 7 Taunt., 188; *Butler's Note*, 34 b, to Co. Lit., 53. In that case the court decided, whether rightly or not I am not called upon to decide, that the relaxation as between landlord and tenant was confined to erections for the benefit of trade, and did not extend to those for agricultural purposes.

It is the less necessary to consider the nature and extent of these exceptions, because they steer wide of the present case, and all proceed upon the ground that such fixtures are annexed to the freehold, and would, under the general rule, form a parcel of the inheritance. See *Lee v. Risdon*, 7 Taunt., 188. In *Lawton v. Salmon*, 1 H. Bl., 259, *n.*, Lord Mansfield, with reference to the salt-pans, said "that the salt spring is a valuable inheritance, but no profit arises unless there is a salt work, which consists of a building, etc., for the purpose of containing the pans, etc., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessaries, necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance." Every word here used is equally applicable to the case now before the court. The water-wheel and gearing are necessary for the use of the factory. They were placed there by Merrick, when owner, for the purpose of being used as parcel of the factory. The mill could not operate without them. They were never disannexed by Merrick. They passed, or might have passed, by the alienation of Merrick, as parcel of the factory mill. That has not been, as I recollect, directly denied; and if denied, it is clearly well founded in law. The citation from Comyns' Digest, already made, shows it. In *Shepp. Touch.*, 90, it is laid down that "that which is parcel or of the essence of a thing, albeit at the time of the grant it be actually severed from it, does pass by the grant of the thing itself. And therefore by the grant of a mill the mill-stone doth pass, albeit at the time of the grant it be actually severed from the mill. So by the grant of a house, the doors, windows, locks and keys do pass as parcel thereof, albeit at the time of the grant they be actually severed from it." See, also, *Colegrave v. Dias Santos*, 2 Barn. & Cres., 76; *Union Bank v. Kellogg*, 15 Mass., 159. These are stronger cases than the present, for here there was no severance at any time before the dower absolutely attached to the estate. Fixtures of this nature pass also as parcel of the inheritance under a levy by execution. This was so held in conformity to the rule of the common law in *Goddard v. Chace*, 7 Mass., 432. Nor is there anything in *Gale v. Ward*, 14 Mass., 352, which interferes with its authority, for the machines there described were not, strictly speaking, fixtures. The same answer may be given to *Cresson v. Stout*, 17 Johns., 117.

Upon the plain principles of the common law, then, the water-wheel and its

gearing were fixtures annexed to the freehold. They were necessary to the beneficial use of the factory, and could not be removed without prejudice to it. They were so annexed, not by a tenant for life or for years, or for a limited purpose, but by the owner for the permanent enjoyment of the inheritance. They would have passed as appurtenances or incidents to the heir by descent to a purchaser by sale, and to an execution creditor, who should levy on the estate as parcel of the factory. Nothing has been done to disannex them from the freehold. I cannot therefore perceive any ground upon which the court can declare them not to be parcel of the inheritance for the purpose of dower. Against the heir they would clearly be parcel, and I think they must be so as to purchasers. They do not fall within any exception in favor of which the ancient rule of law has been relaxed.

I was desirous of having somewhat more full knowledge of the nature and position of the water-wheel and gearing than the report furnished; and the information has been furnished by the intelligent gentleman whose statement has been used by the consent of the parties. He clearly shows them to be fixtures in the correct sense of the term. The water-wheel is indeed movable, and hung on gudgeons, and has a head-stock not fixed; and the gearing consists of upright shafts and horizontal shafts on which are drums, and on these are belts. All these are connected with cog-wheels, and the belts carry the motion from one to another. The ends of the shaft of the wheel rest of course on permanent fixtures in the building, and it cannot be taken out without removing a part of the building and being separated into pieces.

The exception, therefore, as to the fixtures, is also overruled, and the report is confirmed.

SMITH v. WOODWORTH.

(Circuit Court for Iowa: 4 Dillon, 584-588. 1877.)

STATEMENT OF FACTS.—Sarah A. Smith sued the executors and heirs of her (alleged) husband for her dower or the Iowa statutory substitute therefor. The defense was, first, that there had been a divorce between Smith and his wife before the death of the former, to which she replied that she had never heard of it until after his death; second, that she had been guilty of adultery and thereby forfeited her dower; and third, that there had been a parol agreement between Smith and his wife by which \$300 was paid to her in lieu of dower, and in full of all demands, there having then been a valid divorce. To the second and third pleas in defense the plaintiff demurred that they were insufficient in law to bar her dower.

§ 491. *The statute of Westminster 2, which makes adulterous elopement of the wife a bar to dower, is not in force in Iowa.*

Opinion by DILLON, J.

In respect to the *second* special defense to the action, I am of opinion that the statute of Westminster 2 (13 Edw. 1, ch. 34), upon which that defense is based, and which is: "If a wife willingly leave her husband, and go away, and continue with the adulterer, she shall be barred forever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon, except that her husband willingly, and without coercion of the church, reconcile her and suffer her to dwell with him; in which case she shall be restored to her action,"—never having been expressly adopted in Iowa, is not in force therein nor is it part of the law of the state. The ground of this conclusion is that its provisions are inconsistent with the legislation of

the state on the subject of dower, or the widow's right in the estate of her husband, and the mode in which such right may be barred or relinquished, and with the statutory provisions in respect to divorce on the ground of adultery. The reasons which support this conclusion under similar legislation are so forcibly stated by the supreme judicial court of Massachusetts in *Lakin v. Lakin*, 2 Allen, 45, that I content myself with a reference to that case, and to *Bryan v. Batcheler*, 6 R. I., 543, and *Lecompte v. Wash*, 9 Mo., 551, without here setting forth the arguments upon which they rest. This conclusion concedes that the fee-simple provision for the widow made by the act of 1862, which is a substitute for dower, is governed by the same principles as to forfeiture that apply to the right or estate in dower; but the point need not be decided, for the concession is the view most favorable to the defendants. Under the act of 1862, the rights of husband and wife in the estate of the other are reciprocal and the same; and it would hardly be contended that the statute of Westminster would apply to deprive the husband, who had committed adultery, of his right to one-third of the estate of his wife.

§ 492. *A verbal contract in lieu of dower between husband and wife is insufficient in law to bar dower.*

As respects the *third* special defense, I am of opinion that the verbal transaction therein set forth does not amount to a relinquishment or legal bar to dower or the widow's right; and in view of the allegation that there had been a valid divorce, which, of itself, would be a bar to dower, and the prospective nature of the alleged release, this transaction is not of such a nature, whatever might be its effect in equity, as to amount to a bar to this suit. See *McKee v. Reynolds*, 26 Ia., 578, and cases cited. Both pleas are insufficient.

Demurrer sustained.

HERBERT v. WREN.

(7 Cranch, 370-382. 1818.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This suit was brought by Richard Wren and Sussanna, his wife, formerly the wife of Lewis Hipkins, praying that dower may be assigned her in a tract of land of which her former husband died seized, and which has since been sold and conveyed to the defendant, Joseph Deane, or that a just equivalent in money may be decreed her in lieu thereof.

The material circumstances of the case are these: Lewis Hipkins being seized as tenant in common with Philip Richard Fendall of one-third of a tract of land lying in the county of Fairfax, by his deed executed by himself and wife, leased the same to Philip Richard Fendall for the term of thirteen years, to commence on the 1st of September in the year 1794, at the annual rent of 140*l*. In the year 1794 Lewis Hipkins departed this life, having first made his last will and testament, in writing, in which he devised both real and personal estate to his wife; the real estate for her life, with remainder to his three daughters.

To his two sons he devised the premises in question, and added that if, during the minority of his sons, Philip R. Fendall should erect thereon another water-mill or water-mills, his desire was that his sons, or the survivor of them, should, at the expiration of the lease for years made to the said Philip, pay one-third part of the value of such mill or mills, and in default of payment

that P. R. Fendall should be permitted to hold the same at the present rent until the value should be received. He directed his two tracts of land in London to be sold for the payment of his debts, and appropriated the annual rent accruing on the lands leased to P. R. Fendall to the education and maintenance of his children.

The testator then adds the following clause: "If it should so happen that the remaining part of my estate not herein bequeathed should prove insufficient to pay all just demands against my estate, then my will and desire is that my executors shall sell as much of my real and personal estate as may be necessary to make up the deficiency, and that they shall sell such parts as will divide the loss among my representatives as nearly as may be in proportion to the property bequeathed to them and each of them."

On the 13th day of December, in the year 1797, Susanna Hipkins, then the widow of Lewis Hipkins, conveyed her dower in the premises in question, and also in the land devised to her for life by her deceased husband, to the plaintiffs, John Adams and Westley Adams, in trust for her use. In the year 1803, P. R. Fendall and Walker Muse instituted a suit against the executors and children of Lewis Hipkins, deceased, and in the month of June in that year, the cause came on to be heard by consent of parties, when the court decreed that the whole estate of Lewis Hipkins be sold and the money brought into court. The report of the sale does not appear on the record, but an entry was made that the report was made and confirmed by the court.

Under this decree, the premises were sold and conveyed to the defendant, E. J. Lee, who purchased in trust for P. R. Fendall, one of the executors of Lewis Hipkins. On the deed of conveyance is a memorandum, stating that the property was sold subject to dower. Lee conveyed the premises to the other defendants, trustees of P. R. Fendall, for the purposes of a trust deed which had been previously executed, conveying to them the other two-thirds of the same estate on certain trusts in the deed recited. The trustees sold and conveyed to the defendant, Joseph Deane.

The bill states that the defendant, Joseph Deane, had not paid the purchase money, and was willing, should the court decree dower in the premises, to give an equivalent in money in lieu thereof. Soon after the trust deed from Susanna Hipkins to John and Westley Adams, she intermarried with the plaintiff, Richard Wren. Philip R. Fendall continued to pay the plaintiff, Susanna, during her widowhood, and the plaintiffs, Richard and Susanna, after their intermarriage, one-third part of the rent accruing on the premises devised to him by Hipkins and wife until the year 1803; since which he has refused or neglected to pay the same.

The defendants, the trustees of Philip Richard Fendall, he having departed this life previous to the institution of this suit, insist: 1. That the remedy of the plaintiffs, if they have any, is at law, and that a court of equity can take no jurisdiction of the cause. 2. That the provision made by the will of Lewis Hipkins for the plaintiff Susanna, not having been renounced by her, bars her right of dower in his estate.

The defendant, Joseph Deane, has put in no answer, and as against him the bill is taken as confessed. The circuit court determined that the claim of the plaintiff, Susanna, to dower was not barred, and decreed her a sum in gross as an equivalent therefor. From this decree the trustees of Philip Richard Fendall have appealed. The plaintiffs also object to so much of the decree as refuses

them rent on the premises, and have therefore taken out likewise a writ of error.

The material questions in the cause are: 1. Has a court of equity jurisdiction in the case? 2. Is the plaintiff, Susanna, entitled to dower? 3. If these points be in her favor, what decree ought the court to make?

§ 493. *Concurrent jurisdiction of equity and law in the assignment of dower upheld.*

According to the practice which prevails generally in England, courts of equity and courts of law exercise a concurrent jurisdiction in assigning dower. Many reasons exist in England in favor of this jurisdiction; one of which is, that partitions are made and accounts are taken in chancery in a manner highly favorable to the great purposes of justice. In this case, dower is to be assigned in an undivided third part of an estate, so that it is a case of partition of the original estate as well as of assignment of dower in the part of which Lewis Hipkins died seized. An additional reason and a conclusive one in favor of the jurisdiction of a court of equity is this: The lands are in possession of a purchaser who has not yet paid the purchase money. A court of law could adjudge to the plaintiffs only a third part of the land itself. Now, if the plaintiffs be willing to leave the purchaser undisturbed, to affirm the sales and to receive a compensation for her dower instead of the land itself, a court of equity ought never, by refusing its aid, to drive her into a court of law, and compel her to receive her dower in the lands themselves. This is therefore a proper case for application to a court of chancery.

§ 494. *If a devise of land in Virginia to the widow appears from the circumstances to be in lieu of dower, she must elect, and cannot take both.*

2. It is perfectly clear that the provision made by Lewis Hipkins in his last will is no bar to a claim of dower, for several reasons, of which it will be necessary to mention only two. 1. It is not expressed to be made in lieu of dower. 2. It is not averred that she has accepted the provision and still enjoys it.

It remains to inquire what decree the court ought to make in the case. The first question to be discussed is this: Is the plaintiff Susanna entitled both to dower and to the provision made for her in the will of her late husband? The law of Virginia has been construed to authorize an averment that the provision in the will is made in lieu of dower, and to support that averment by matter *dehors* the will. But, with the exception of this allowance to prove the intention of the testator by other testimony than may be collected from the will itself, the act of the Virginia legislature is not understood in any respect to vary the previously existing common law.

In the English books there are to be found many decisions in which the widow has been put to her election, either to take her dower and relinquish the provision made for her in the will, or to take that provision and relinquish her dower. There are other cases in which she has been permitted to hold both. The principle upon which these cases go appears to be this: It is a maxim in a court of equity not to permit the same person to hold under and against a will. If therefore it be manifest, from the face of the will, that the testator did not intend the provision it contains for his widow to be in addition to her dower, but to be in lieu of it; if his intention, discovered in other parts of the will, must be defeated by the allotment of dower to the widow, she must renounce either her dower or the benefits she claims under the will. But

if the two provisions may stand well together, if it may fairly be presumed that the testator intended the devise or bequest to his wife as additional to her dower, then she may hold both.

The cases of *Arnold v. Kempstead* and wife, of Villareal and Lord Galway and of *Jones v. Collier* and others, reported by Ambler, are all cases in which, upon the principle that has been stated, the widow was put to her election. In the case under consideration neither party derives any aid from extrinsic circumstances, and therefore the case must depend on the will itself.

The value of the provision made for the wife, compared with the whole estate, is not in proof; but so far as a judgment on this point can be formed on the evidence furnished by the will itself, it was supposed by him to be as ample as his circumstances would justify. The only fund provided for the maintenance and education of his five children is the rent of 140*l.* per annum, payable by P. R. Fendall. Since he has made a distinct provision for his wife, the presumption is much against his intending that this fund should be diminished by being charged with her dower.

That part of the will, too, which authorizes P. R. Fendall, in the event of building a mill, and not receiving from the sons of the testator their half of its value, to hold the premises until the rent should discharge that debt, indicates an intention that in such case the whole rent should be retained. The clause, too, directing the residue of his estate to be sold for the payment of debts, is indicative of an expectation that the property stood discharged of dower, and is a complete disposition of his whole estate. The testator appears to have considered himself as at liberty to arrange his property without any regard to the incumbrance of dower. Upon this view of the will it is the opinion of the majority of the court that the testator did not intend the provision made for his wife as additional to her dower, and that she cannot be permitted to hold both.

She has not, however, lost the right of election. No evidence is before the court that she has accepted the provision of the will, nor that she still enjoys it. Indeed, there is much reason to suppose the fact to be otherwise. The decree of 1803 does not except the lands decreed to her for life from its operation, nor is the court informed by the evidence that those lands were not sold under it. But if she had accepted that provision and still enjoyed it, there is no evidence that she considered herself as holding it in lieu of dower. On the contrary, she was in the actual perception of one-third of the rent accruing on the lease held by P. R. Fendall; and in the deed executed by her in 1797, before her second marriage, she conveys her dower in the lands leased to Fendall, and also her dower in the lands devised to her by her deceased husband. It is therefore apparent that she never intended to abandon her claim to dower.

§ 495. *If a wife join her husband in a lease for years, she is still entitled to dower in the rent.*

The next inquiry to be made by the court is, to what profits is the plaintiff, Susanna, entitled in consequence of the detention of dower? It is unnecessary to decide whether, in general, a person claiming dower from a purchaser can recover profits which accrued previous to the institution of her suit. In this case the plaintiff was in the actual enjoyment of dower. She received one-third of the rent accruing from the premises for nine years. She was therefore in full possession of her dower estate; and when afterwards the land was sold under a decree of a court, P. R. Fendall was one of the executors who made the sale, and was himself, in effect, the purchaser of the estate. Upon

no principle could he justify the refusal to pay that portion of the rent which was equal to her dower in the land, unless on the principle that she was not entitled to dower. In this case, therefore, the plaintiff is entitled to one-third of 140% per annum, for the remaining four years of the lease under which P. R. Fendall held the land, and to an account for profits after the expiration of the lease.

But the plaintiff, Susanna, cannot claim the profits on her dower and hold any portion of the particular estate devised to her, or of the profits on that estate. An account therefore must be taken, if required by the defendants, showing what she has received under the will of her husband. This must be opposed to the profits to which she is entitled for dower, and the balance placed to the credit of the party in whose favor it may be.

It remains to inquire whether the allowance of a sum in gross in lieu of dower in the land itself, or of the interest on one-third of the purchase money, might legally be made. This must be considered as a compromise between the plaintiffs and the defendant Deane. His assent being averred in the bill, and the bill being taken *pro confesso* as to him, this may be considered as an arrangement to which he has consented. This, however, cannot affect the other defendants. They have a right to insist that, instead of a sum in gross, one-third of the purchase money shall be set apart, and the interest thereof paid annually to the tenant in dower during her life. If the parties all concur in preferring a sum in gross to the decree which the court has a right to make, still, it is uncertain on what principle seven years were taken as the value of the life of the tenant in dower. It is probably a reasonable estimate, but this court does not perceive on what principles it was made, nor does the record furnish the means of judging of its reasonableness.

This court is of opinion that there is error in the decree of the circuit court in not requiring the plaintiff, Susanna, to elect between dower and the estate devised to her by her late husband, and in not allowing profits on her dower estate if she shall elect to take dower. The decree is to be reversed and the cause remanded for further proceedings, in conformity with the following decree:

This court is of opinion that the plaintiff, Susanna, is not barred of her right of dower in the lands of which her late husband, Lewis Hipkins, died seized, but that she cannot hold both her dower and the property to which she may be entitled under the will of the said Lewis. She ought, therefore, to have made her election either to adhere to her legal rights and renounce those under the will, or to adhere to the will and renounce her legal rights, before a decree could be made in her favor.

This court is further of opinion that the plaintiff, Susanna, having been in possession of her dower by the receipt of rent for several years after the death of her late husband, is, in the event of her electing to adhere to her claim of dower, entitled to receive from the estate of P. R. Fendall the profits which have accrued on her dower estate in his possession, from the time when he ceased to pay the same, until the sale was made to the defendant, Joseph Deane, and is entitled to receive from the said Joseph Deane the profits which have accrued thereon since the same was sold and conveyed to him, to ascertain which an account ought to be directed. And the court is further of opinion that an account ought also to be directed to ascertain how much the said Susanna has received from the estate of her late husband, and what profits she has received from the estate devised to her in his will; all which must be deducted from her claim for dower.

The court is further of opinion that if the parties, or either of them, shall be dissatisfied with the allotment of a sum in gross, and shall prefer to have one-third part of the purchase money, given by the said Joseph Deane for the lands in which the plaintiff, Susanna, claims dower, set apart and secured to her for her life, so that she may receive during life the interest accruing thereon, and shall apply to the circuit court to reform its decree in this respect, the same ought to be done.

It is the opinion of this court that there is no error in the decree of the circuit court for the county of Alexandria in determining that the plaintiff, Susanna, was entitled to dower in the estate of her late husband, Lewis Hipkins, deceased, but that there is error in not requiring her to elect between her dower and the provision made for her in the will of her late husband, and in not decreeing profits on the same. This court doth, therefore, reverse and annul the said decree; and doth remand the cause to the said circuit court with instructions to reform the said decree according to the directions herein contained.

MR. JUSTICE JOHNSON dissented.

UNITED STATES v. DUNCAN.

(Circuit Court for Illinois: 4 McLean, 99-108. 1846.)

Opinion of the COURT.

STATEMENT OF FACTS.—This bill was filed by the United States to subject the lands of Gen. Duncan, deceased, to the payment of liabilities incurred by him as a security for Linn, who was a receiver of public moneys at Vandalia, and who was a defaulter to a large amount, for which a judgment was obtained against Duncan. And this bill was brought to investigate the title to the lands of Duncan's estate, ascertain the extent of his interests, and remove all embarrassments. The question now raised and discussed, and which we are to decide, is, whether the widow of Gen. Duncan is entitled to dower. That the statute gives her dower in all the real estate of her deceased husband, as well that which he held by contract as that which he held by deed in fee-simple, is not disputed; but it is alleged that she is barred under the will. By the will, Mrs. Duncan received a considerable amount of personal property, and, it seems, she has not renounced this right to claim her dower under the statute.

§ 496. *Dower cannot be divested except upon the widow's full knowledge of her rights.*

On the part of the government, it is contended that where at common law a devise is made in lieu of dower, in a reasonable time, the widow must make her election to claim dower, or she will be barred. 8 Paige, 328; 4 Kent's Com., 57. He says, "it is likewise settled, that a collateral satisfaction, consisting of money or other chattel interests, given by will and accepted by the wife after her husband's death, will constitute an equitable bar of dower." She may make her election to claim dower some years after her husband's death, and where she has received that which was intended to be in lieu of dower, if she acted in any degree in ignorance of her rights. But where she has acted with a full knowledge of her rights, in the acceptance of the testamentary provision instead of her dower, she will be bound by her acceptance.

§ 497. *Returning part of estate which wife had in her own right is not in lieu of dower.*

But the question is, whether the bequest referred to was given, or intended

to be given, in lieu of dower. Certain real estate had been conveyed to Mrs. Duncan, to secure her against contingencies, which was greatly below the estate she brought to her husband. This can in no sense be considered operating against her claim of dower. It was only returning to his wife a part of the estate which she had in her own right, and which he came into the possession of by marriage. It is argued that it was the intent of the testator to give personal property in lieu of dower. But there is no expression in the will which authorizes such an inference, unless it be the simple fact of bequeathing the personal property. In deciding this question, regard must be had to the condition of the parties. Gen. Duncan was a man of large property, and at the time of his death, in all probability, expected to be relieved, in some form, from a part of his suretyship. He seems only to have been embarrassed on this account. It is true, the Revised Statutes of Illinois of 1833, p. 624, declare "that any provision by will bars dower, unless it be otherwise expressed in the will, and unless the widow in six months renounces the provision."

§ 498. *Dower, how barred by a legacy.*

Now this provision must have a reasonable construction. Will it be contended that any bequests in the will to the wife, however small, will bar dower? Such could not have been the intention of the legislature. And if this construction be not sustainable, is there any other rule than that the bequest should be such as would be a reasonable compensation for dower in the real estate? Can the wife be divested of her dower, which is a legal right, on any other principle? Is she barred of her dower if she accept a gift of five or twenty dollars, or some piece of furniture under the will from her dying husband, as an evidence of his affection? Certainly she is not. Where any property was bequeathed to the wife, which, from the amount, might be presumed under the statute to be in lieu of dower, and there was nothing in the will to contradict this presumption, she would be bound by it ordinarily, unless her election of dower were made in six months. This appears to be a reasonable construction of the statute, which will effectuate the intention of the legislature.

In treating upon this subject, Mr. Justice Story, in his Treatise on Equity, sec. 1088, says: "If a testator should bequeath property to his wife, manifestly with the intention of its being in satisfaction of her dower, it would create a case of election. But such an intention must be clear and free from ambiguity. And it would not be inferred from the mere fact of the testator's making a general disposition of all his property, although he should give his wife a legacy; for he might intend to give only what was strictly his own, subject to dower. There is no repugnancy in such a bequest." "Besides," he says, "the right to dower being in itself a clear, legal right, an intent to exclude that right by a voluntary gift ought to be demonstrated either by express words or by clear and manifest implication."

This is the substance of the authorities on this subject. In *Birmingham v. Kirwan*, 2 Sch. & Lefr., 452, in the clear language of Lord Redesdale the above doctrine is forcibly illustrated. 10 Pickering, 510. In *Clark v. Sewell*, 3 Atk., 97, it is said, "what is given by a will ought, from the character of the instrument, ordinarily be deemed as given as a mere bounty, unless a contrary intention is apparent on the face of the instrument," "or, as it has been well expressed, whatever has been given by a will is *prima facie* to be intended as a bounty or benevolence."

§ 499. *A widow will not be held to have renounced her dower before opportunity to ascertain facts enabling her to make election.*

But there seems to have been a renunciation under the will after the lapse of eighteen months, which, it is contended, is too late, as the statute requires it to be done in six months. Here, too, the statute must receive a reasonable construction. Suppose the widow remains in utter ignorance of the estate of her husband, and has no means within the time limited to ascertain the facts which would enable her to make an election. It has often been held that years, under certain circumstances, may be allowed for this election. That the widow may file her bill to obtain a knowledge of the estate. That where she has been in possession of the bequest for years, under an ignorance of the estate, she may renounce under the will and claim dower.

From the nature of the case it must be perceived that there are cases in which the election could not be made in six months, and it would not be extending the principles of equity beyond their legitimate limits in such cases of hardship to relieve the widow. The estate of Gen. Duncan was large, and, by the suretyship named, much embarrassed. It was impossible to understand the extent of the property and the nature of his liabilities, it would seem, in six months, so as to determine this matter.

Upon the whole, when we consider the small amount of the personal property bequeathed, one-third of which belonged to the widow, the presumption cannot arise that the bequest was given in lieu of dower. And no fair construction of the statute would bring such a case within it. We think Mrs. Duncan is endowable of the lands of her husband, and commissioners will be appointed to set it off, unless an arrangement on the subject shall be made.

HALL v. SAVAGE.

(Circuit Court for Massachusetts: 4 Mason, 273-275. 1826.)

STATEMENT OF FACTS.—This was a writ of dower. The parties agreed that the husband, in his life-time, conveyed by deed a good title of all his interest in the premises to one Wheeler, and that the title of the latter had passed to the defendants; that the plaintiff executed on the deed of her husband, under seal and in the presence of witnesses, a writing in these words: "I agree in the above conveyance."

§ 500. *By the local law of Massachusetts a wife cannot release her dower except by apt words signifying that intention.*

Opinion by STORY, J.

Upon the facts stated in this case, it appears to me clear that by the local law of Massachusetts the demandant is not barred of her dower. The instrument sealed by her was executed long after the principal deed purports to have been executed by her husband. If, in its terms, the instrument had purported expressly to release her right of dower, I do not think that it would have been, under such circumstances, a bar by our law. The principles applicable to this point were fully considered in *Powell v. Payne*, in this court, and it is not necessary to do more than refer to them.

But I think also, independent of this point, that the instrument cannot be deemed, in construction of law, a release of dower. It does not purport to be such a release. The words are, "I agree in the above conveyance." This can mean no more than her assent to her husband's deed, and that he may sell. But it cannot be interpreted to mean that she thereby released her dower. If

such an instrument had been good there would have been no reason to hold that a signature of the wife in blank to the deed of her husband ought not to be held to operate a release of her dower, because it can have no rational interpretation but as an assent to the deed. The rule of law appears to me plain, that the wife cannot release her dower, except there be apt words to express such intention. Doubtful words ought never to be construed to have such an effect. The demandant is, therefore, entitled to judgment.

STELLE v. CARROLL.

(12 Peters, 201-206. 1838.)

Opinion by TANNEY, C. J.

STATEMENT OF FACTS.—This is an action of dower, and was brought by the plaintiff in error against the defendant, in the circuit court for Washington county, in the District of Columbia, to recover her dower in lots No. 16, 17, 18 and 19, in square No. 728, in the city of Washington. At the trial of the case the circuit court instructed the jury that the demandant was not entitled to recover; to which instruction an exception was taken, and the verdict and judgment being for the defendant, the case has been brought here by the demandant, by writ of error.

The claim for dower in lot No. 19 seems to have been abandoned, as no evidence in relation to it is contained in the record. As respects the other three lots, it appears that Pontius D. Stelle was seized of them in fee, during the coverture of the demandant; and being so seized, by deeds duly executed and recorded mortgaged them in fee to a certain Peter Miller. The deeds were acknowledged by the demandant, on privy examination, according to the act of assembly of Maryland, which was in force when congress assumed jurisdiction over the District of Columbia.

Lots No. 16 and 17 had been incumbered by Stelle, by a previous mortgage to a certain William Turniclife; and after these several mortgages had been made, Stelle executed a deed to Miller, dated January 28, 1811, duly acknowledged and recorded, in which, after reciting that he had mortgaged lots No. 16 and 17 to Turniclife, to secure the payment of \$4,000, the balance of which had been paid by Miller, and from which the said Stelle was wholly released and exonerated; and reciting, also, that Miller had advanced to Stelle several large sums of money, to secure which Stelle had conveyed to him lot No. 18, with a deed of defeasance from Miller to Stelle; which sums of money the said Stelle having failed to pay, the conveyance of this lot had become absolute and unconditional; and that the said Stelle was desirous of more fully conveying and assuring these lots to Miller, he, the said Stelle, in consideration of the premises, and for and in consideration of the sum of \$892.96, paid him by the said Miller, the receipt of which he thereby acknowledged, did "give, grant, bargain, sell, alien, release and confirm" these three lots to the said Peter Miller, his heirs and assigns. The deed contained a covenant of general warranty, "excepting the liens before mentioned." The demandant did not join in nor acknowledge this deed. Stelle died in 1828; and was out of possession of these lots for some time before his death. The defendant Carroll claims under Peter Miller.

The case has been fully argued, and many decisions in different state courts have been cited and relied on in the argument. It is, however, unnecessary to review and compare them; because the question must depend on the laws of

Maryland as they stood at the time that congress assumed jurisdiction over the District of Columbia; and the decisions referred to in the argument, although made by tribunals entitled to high respect, yet cannot be received as evidence of the law, in the case before us, since it is well known that in the states where these decisions have been made, the rules of the common law in relation to dower have been modified by a course of judicial decision; and the strictness of the rule which excluded the widow from the dower in an equitable interest has been, in some degree, relaxed. But the doctrines of the common law upon this subject (although since altered by act of assembly) were still the law of Maryland when the United States assumed jurisdiction over this District; and the act of congress of February 27, 1801 (2 Stats. at Large, 103), which provides for its government, declares that the laws of Maryland as they then existed should continue and be in force in that part of the District which was ceded by that state.

§ 501. *According to the law in Maryland and in the District of Columbia, a wife by acknowledgment of a mortgage under privy examination cuts off her dower.*

It is not necessary to refer to adjudged cases for the purposes of proving that, according to the principles of the common law, a widow is not dowable in her husband's equity of redemption; and if a man mortgages in fee before marriage, and dies without redeeming the mortgage, his widow is not entitled to dower. In this case the mortgages were made during the coverture, but the mortgage deeds were acknowledged by the wife upon privy examinations; and these acknowledgments, under the acts of assembly of Maryland of 1715, ch. 47, and 1766, ch. 14, which are in force in this District, debarred her of the right of dower in the lots thus conveyed to the mortgagees.

§ 502. *The wife of a mortgagor has no dower in the equity of redemption.*

The legal estate passed to the mortgagee, and the husband retained nothing but the equity of redemption; and as his wife had no right of dower in this equitable interest, the deed of Stelle to Miller, of January 28, 1811, above mentioned, conveyed to Miller the whole interest which had remained in Stelle. It was unnecessary for the wife to join in or to acknowledge this deed; for as she had no right of dower in the equity of redemption, she had no interest to relinquish when her husband conveyed it to Miller.

§ 503. *Question as to dower where the junior mortgagee, paying the senior mortgage, is entitled to payment of both debts before the mortgagor can regain the legal title.*

The recitals hereinbefore mentioned in the deed of January 28, 1811, have been much relied on in the argument for the plaintiff in error; and it is insisted that, according to the facts there stated, the mortgage to Turnicliffe had been paid off by Miller; and that as it does not appear in the record that it had been assigned to Miller, the payments made by him as recited in the deed above mentioned were a satisfaction of the mortgage, and restored to Stelle the legal estate, and consequently revived the right of dower in his wife in lots No. 16 and 17, which had been mortgaged to Turnicliffe. But it must be remembered that Miller held a mortgage to himself for these lots junior to that of Turnicliffe, and that the payments made by him to discharge a prior incumbrance would not inure to the benefit of Stelle, but that Miller had a right to hold on to the legal estate conveyed to him by his mortgage deed, to secure the payments he had made to Turnicliffe; and Stelle was not entitled to be restored to his legal estate in these lands until the payments to Turni-

cliffe were satisfied, as well as the money due to Miller on the mortgage to himself. Besides, if these payments to Miller could be regarded as an extinguishment of the incumbrance created by the mortgage to Turncliffe, yet the mortgage of the same lots to Miller was outstanding and unsatisfied. The interest of Stelle, therefore, even in that case, could be nothing more than an equity of redemption, and the satisfaction of Turncliffe's mortgage by Stelle himself would not have restored to the defendant the right of dower, of which she had debarred herself by acknowledging the deeds to Miller hereinbefore mentioned. The conveyance of the equity of redemption to Miller for a valuable consideration united in him the entire legal and equitable interests, and this conveyance cannot, upon any principle of law or justice, give a right of dower in these lots to the wife of Stelle.

We think the instruction given by the circuit court was right, and the judgment must therefore be affirmed.

RANDALL v. KREIGER.

(28 Wallace, 137-150. 1874.)

APPEAL from U. S. Circuit Court, District of Minnesota.

STATEMENT OF FACTS.— This was a suit for dower. The case was as follows: Randall and wife, in 1849, executed a power of attorney for the conveyance of lands in Minnesota. At the time there was no statute of Minnesota providing for the execution of such powers by a *feme covert*, and the power of attorney was executed in accordance with the laws of New York, where the principals resided. In 1855 the attorney conveyed the lands in question under the said power of attorney. No statute of the kind above described was in existence in Minnesota until 1857, when the following statute was passed:

"A husband and wife may convey by their lawful agent or attorney any estate or interest in any lands situate in this territory; and all deeds of conveyance of any such lands, whether *heretofore* or hereafter made, under a joint power of attorney from the husband and wife, shall be as binding and have the same effect as if made and executed by the original parties."

In 1859 Randall died and his wife survived him. The only question determined by the court was whether the case came within the curative part of the Minnesota law.

Opinion by MR. JUSTICE SWAYNE.

There is no controversy between the parties as to the facts.

When the power of attorney was given there was no law of Minnesota authorizing such an instrument to be executed by husband or wife, or the attorney to convey under it.

The validity of the deed, as respects Randall, the husband, is not questioned, but its efficacy as to the widow, the appellant in this case, is denied. Her claim to dower is resisted upon several grounds, and among them that the defect in the deed was remedied by the curative act of 1857.

We have found it necessary to consider only the point just stated.

§ 504. *Constitutional law; obligation of contracts; curative statutes.*

It is not objected that the act of 1857, as regards its application to the present case, is in conflict with the constitution of the state. We have carefully examined that instrument and have found nothing bearing upon the subject.

Nor was the act forbidden by the constitution of the United States.

There is nothing in that instrument which prohibits the legislature of a

state or territory from exercising judicial functions, nor from passing an act which divests rights vested by law, provided its effect be not to impair the obligation of a contract. Contracts are not impaired but confirmed by curative statutes. *Satterlee v. Matthewson*, 2 Pet., 380 (Constr., §§ 1630-35); *Watson v. Mercer*, 8 id., 110 (Constr., §§ 1849-51).

§ 504a. *Marriage, and the common law right of dower, considered.*

Marriage is an institution founded upon mutual consent. That consent is a contract, but it is one *sui generis*. Its peculiarities are very marked. It supercedes all other contracts between the parties, and with certain exceptions it is inconsistent with the power to make any new ones. It may be entered into by persons under the age of lawful majority. It can be neither canceled nor altered at the will of the parties upon any new consideration. The public will and policy controls their will. An entire failure of the power to fulfill by one of the parties, as in cases of permanent insanity, does not release the other from the pre-existing obligation. In view of the law it is still as binding as if the parties were as they were when the marriage was entered into. Perhaps the only element of a contract, in the ordinary acceptation of the term, that exists is that the consent of the parties is necessary to create the relation. It is the most important transaction of life. The happiness of those who assume its ties usually depends upon it more than upon anything else. An eminent writer has said it is the basis of the entire fabric of all civilized society. *Story's Conflict of Laws*, § 109.

By the common law, where there was no ante-nuptial contract, certain incidents belonged to the relation.

Among them were the estate of tenant by the curtesy on the part of the husband if issue was born alive and he survived the wife, and on her part dower if she survived the husband. Dower by the common law was of three kinds: *Ad ostium ecclesiæ*, *Ex assensu patris*, and that which in the absence of the others the law prescribed. The two former were founded in contract. The latter was the creature of the law. Dower *Ad ostium ecclesiæ* and *Ex assensu patris* were abolished in England by a statute of the 3d and 4th William IV., ch. 105. The dower given by law is the only kind which has since existed in England, and it is believed to be the only kind which ever obtained in this country.

During the life of the husband the right is a mere expectancy or possibility. In that condition of things, the law-making power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs the law of descent and distribution may be moulded according to the will of the legislature.

Laws upon those subjects in such cases take effect at once, in all respects as if they had preceded the birth of such persons then living. Upon the death of the husband and the ancestor the rights of the widow and the heirs become fixed and vested. Thereafter their titles respectively rest upon the same foundation, and are protected by the same sanctions as other rights of property. 2 *Scribner on Dower*, pp. 5-8; *Lawrence v. Miller*, 1 Sandf., 516; S. C., 2 Comst., 245; *Noel v. Ewing*, 9 Ind., 37; *Lucas v. Sawyer*, 17 Ia., 517; *White v. White*, 5 Barb., 474; *Vartie v. Underwood*, 18 id., 561.

§ 505. *Power of legislatures to pass laws giving validity to deeds.*

The power of a legislature under the circumstances of this case to pass laws giving validity to past deeds which were before ineffectual is well settled. Sedgwick on Stat. & Const. Law, 144, note; Cooley on Const. Lim., 376. In *Watson v. Mercer*, 8 Pet., 100 (Const., §§ 1849-51), the title to the premises in controversy was originally in Margaret Mercer, the wife of James Mercer. For the purpose of transferring the title to her husband, they conveyed to a third person, who immediately conveyed to James Mercer. The deed of Mercer and wife bore date of the 30th of May, 1785. It was fatally defective as to the wife in not having been acknowledged by her in conformity with the provision of the statute of Pennsylvania of 1770, touching the conveyance of real estate by *femes covert*. She died without issue. James Mercer died leaving children by a former marriage. After the death of both parties, her heirs sued his heirs in ejectment for the premises and recovered. The supreme court of the state affirmed the judgment. In 1826 the legislature passed an act which cured the defective acknowledgment of Mary Mercer, and gave the same validity to the deed as if it had been well executed originally on her part. The heirs of James Mercer thereupon sued her heirs and recovered back the same premises. This judgment was also affirmed by the supreme court of the state, and the judgment of affirmance was affirmed by this court. This case is conclusive of the one before us. See, also, *Calder v. Bull*, 3 Dall., 388 (Const., §§ 582-99); *Wilkinson v. Leland*, 2 Pet., 627; *Livingston v. Moore*, 7 id., 486 (Const., §§ 1835-44); *Kearney v. Taylor*, 15 How., 495; *Chestnut v. Shane*, 16 Ohio, 599; *Goshorn v. Purcell*, 11 Ohio St., 641; *Watson v. Bailey*, 1 Binn., 477; *Gibson v. Hibbard*, 13 Mich., 215; *Foster v. Essex Bank*, 16 Mass., 245; *State v. Newark*, 3 Dutch., 197.

To the objection that such laws violate vested rights of property it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character. Consent to remedy the wrong is to be presumed. The only right taken away is the right dishonestly to repudiate an honest contract or conveyance to the injury of the other party. Even where no remedy could be had in the courts the vested right is usually unattended with the slightest equity. Cooley's Const. Lim., 378.

There is nothing in the record persuasive to any relaxation in favor of the appellant of the legal principles which, as we have shown, apply with fatal effect to her case. The curative act of 1857 has a strong natural equity at its root. It did for her what she attempted to do, intended to do, and doubtless believed she had done, and for doing which her husband was fully paid.

The purchase money for the lot became a part of his estate, and the entire estate was given to her at his death. Not satisfied with this she seeks to fasten her dower upon the property in question.

The act accomplished what a court of equity, if called upon, would have decreed promptly as to the husband, and would have failed to decree as to the wife only from the want of power. The unbending rule of law as to *femes covert* in such cases would have prevented it. The legislature thus did what right and justice demanded, and the act strongly commends itself to the conscience and approbation of the judicial mind.

Decree affirmed. (a)

(a) Affirming *Randall v. Krelger*,* 2 Dill., 444.

§ 506. *Curtesy*.—A husband cannot be tenant by the curtesy of lands claimed by the wife, but which were held adversely throughout the coverture. *Mercer v. Selden*, 1 How., 87.

§ 507. By the common law, the husband is entitled to curtesy in the trust estate of his wife, in the same manner as if it were a legal estate. *Robinson v. Codman*, 1 Sumn., 131.

§ 508. Tenancy by the curtesy, as modified by the statute of Oregon. *Elliott v. Teal*, 5 Saw., 249.

§ 509. *Dower, its nature, etc.*—Except as against the mortgagee, the mortgagor is the real owner of the property mortgaged, and the equity is chargeable with the widow's dower. *Van Ness v. Hyatt*, 18 Pet., 294.

§ 510. A party purchasing from a trustee is bound to take notice of whether or not there is an outstanding dower interest in the property. *Greenleaf v. Queen*, 1 Pet., 147.

§ 511. Estates held by the husband in trust are not liable to the dower of the wife. *Robinson v. Codman*, 1 Sumn., 129; *Lenox v. Notrebe*, Hemp., 251.

§ 512. The widow is not entitled to dower in lands of which her husband died possessed, but to which he had no legal title, although he had paid the whole purchase money. *Williams v. Barrett*, 2 Cr. C. C., 873.

§ 513. A wife is not entitled to dower in a reversion. *Robinson v. Codman*, 1 Sumn., 129.

§ 514. A married woman is not entitled to dower in real estate which was held as partnership assets. *Hiscock v. Jaycox*,* 12 N. B. R., 507.

§ 515. Where real estate is covered by a mortgage, the inchoate dower attaches to the equity of redemption only. *Ibid*.

§ 516. If a wife join her husband in a lease for years, she is still entitled to dower in the rent. *Herbert v. Wren*, 7 Cr., 370.

§ 517. Dower will be assigned in equity, where there has been a parol partition by tenants in common, if the husband died seized. *Nutt v. Mechanics' Bank*, 4 Cr. C. C., 102.

§ 518. Where a husband has an equitable interest in land, the Indiana statute gives the wife an inchoate interest therein, which becomes absolute upon the husband's bankruptcy. In such case, if the purchase money is not fully paid, the wife is liable for her proportion. *Warford v. Noble*, 9 Biss., 320.

§ 519. Under the statutes of Indiana, the wife has an inchoate right in her husband's lands, contingent upon his death or the extinguishment of his title by judicial sale, which will be guarded and protected by the court. *Thames Loan and Trust Co. v. Julian*, 7 Biss., 446.

§ 520. Right of dower in Alabama. *Wilson v. Jordan*, 3 Woods, 642.

§ 521. Wife's estate in donation and husband's interest therein considered under Oregon act: and held that statute of limitations upon actions to recover real property does not run against a woman to whom the right to sue accrues during coverture until the disability is removed. *Wythe v. Smith*, 4 Saw., 17.

§ 522. A widow is dowable of a "donation claim" in Washington territory, especially if all public requisitions have been complied with and the claimant is entitled to his patent. How suit should be brought, and what damages for detention allowed, here considered. *Ebey v. Ebey*,* 1 Wash. Ty, 216.

§ 523. Rights of an Indian woman, widow of one who received a patent for lands from the United States. Her right to dower. *Pka-o-wah-ash-kum v. Sorin*, 8 Fed. R., 743.

§ 524. Remedies for assignment of dower.—Remedies for obtaining dower are regarded as "cases at law" within the meaning of provisions in the judiciary act relating to error and appeal. *Parish v. Ellis*, 16 Pet., 451.

§ 525. A widow has no estate in the land until her dower is assigned; her right is not divested by a sale of the land for taxes; the tenant in possession must pay the taxes. *Blodget v. Brent*,* 3 Cr. C. C., 394.

§ 526. As to awarding damages from the time of demand, see *Nutt v. Mechanics' Bank*, 4 Cr. C. C., 102.

§ 527. How dower should be assigned where the husband had sold the land and the purchaser improved it. *Leggett v. Steele*, 4 Wash., 305.

§ 528. The dower right of a widow not yet assigned to her may be subjected in equity to the payment of her own debts contracted since her husband's decease. Receiver appointed where assignment by metes and bounds was not practicable. *Davison v. Whittlesey*,* 1 MacArth., 163.

§ 529. Dower should be assigned according to the value of the lands at the time dower is assigned, exclusive of improvements made by the purchaser. And the mode indicated by the practice of the state court will be employed in setting off dower by the federal court. *Johnston v. Vandyke*,* 6 McL., 422.

§ 530. Upon writ of dower the marriage was permitted to be proved by parol evidence of cohabitation as man and wife. *Blodget v. Thornton*, 3 Cr. C. C., 176.

§ 531. Loss of rights of dower by laches and delay, as against parties in possession of lands in which dower is claimed. *Pka-o-wah-ash-kum v. Sorin*, 8 Fed. R., 745.

§ 532. If the husband does not die seized, the widow can no more claim damages in equity for the non-assignment of her dower than she can at law. *Alexander v. Selden*, 4 Cr. C. C., 96.

§ 533. An assignee in bankruptcy is not bound to protect the dower rights of the bankrupt's wife against the consequences of her own acts prior to the bankruptcy, nor to inquire whether homestead rights can be claimed as against incumbrancers whose title is superior to his own. *Dudley v. Easton*, 14 Otto, 99.

§ 534. Dower, how forfeited, barred, etc.— Under the Virginia act which declares that, if a wife willingly leave her husband and go away and continue with an adulterer, etc., she shall forfeit dower, any such separation on her part which is not brought about by the husband's act or personal constraint—as where the husband wished her to accompany him, and she refused on trivial grounds—is “willingly leaving.” And open state of adultery, whether in one house or another, and whether with or without the ceremony of marriage, satisfies the statute. *Stegall v. Stegall*, 2 Marsh., 256.

§ 535. But though dower is thus forfeited, the distributive share is not. *Ibid*.

§ 536. The sale by an assignee under the bankrupt act will not pass the real estate so as to bar the dower interest of the bankrupt's wife. *In re Angier*,* 10 Am. L. Reg. (N. S.), 190.

§ 537. Where a wife joins in a mortgage of her husband's land, her right of dower cannot be barred by a sale free of the incumbrance in the bankruptcy court, but only by a sale of the mortgaged property, under a power of sale contained in the mortgage, or a decree of a court of competent jurisdiction, where she can be made a party to the proceedings. *In re Bartenbach*,* 11 N. B. R., 61.

§ 538. Part of the purchase money cannot be allowed by chancery in lieu of dower when the estate is sold, unless by consent of all the parties interested. *Herbert v. Wren*, 7 Cr., 370.

§ 539. Where a widow deeds as devisee under the will of her husband, and afterwards renounces the will under the statute, she cannot repudiate her deed and claim dower. She is estopped. *Dundas v. Hitchcock*, 12 How., 256.

§ 540. A devise in Virginia appearing to be intended in lieu of dower, the widow is put to her election. *Herbert v. Wren*, 7 Cr., 370.

§ 541. If a widow renounces the provision made for her in the will, the remainder-man takes an immediate estate in the property devised, subject to the widow's dower. *Ladd v. Ladd*, 2 Cr. C. C., 505.

§ 542. As against an assignee in bankruptcy, a wife is not barred of her right to dower by reason of her having joined with her husband in a deed fraudulent as to creditors. *Cox v. Wilder*, 2 Dill., 45.

§ 543. Inadequacy of price in procuring a release of dower to a deceased man's lands, as affected by the question of marriage or no marriage. *Holmes v. Holmes*, 1 Saw., 99 (§§ 18-27).

§ 544. The relinquishment of dower is a valuable consideration, and will uphold a post-nuptial settlement. *Bank of United States v. Lee*,* 5 Cr. C. C., 319. See §§ 202, 416.

§ 545. Dower, how released by deed.— A married woman's execution of a deed with her husband does not relinquish her dower without acknowledgment. *Moore v. Thomas*,* 1 Cr., 201.

§ 546. Held, under statute, that a widow was not barred of dower by her acknowledgment of a deed not recorded. *Kurtz v. Hollingshead*, 4 Cr. C. C., 180.

§ 547. A widow cannot be compelled in equity to make acknowledgment of a deed executed by her and her husband, while he was alive, on a sale of her land, where the sale is shown to have been without her consent and with no benefit accruing to her. *Providence v. Manchester*, 5 Mason, 59 (Conv., § 83). And see *Manchester v. Hough*, 5 Mason, 67.

§ 548. A legislature may remedy by statute formal defects in deeds executed by husband and wife, so as to debar dower of the wife; as where the magistrate did not certify that he read the contents of the deed, etc., as the law required. *Raverty v. Fridge*,* 3 McL., 230. And see *supra*, § 464.

§ 549. A. and B. were married in 1810 in Michigan territory. A. was seized of real estate in 1816, which he sold; afterwards moving out and continuing a non-resident until his death in 1850. In 1846 the state of Michigan restricted by statute the right of dower to lands of which the husband died seized, but providing expressly that no right which had already attached or vested should be thereby affected. Held, that the wife's dower right had not been cut off. *Johnston v. Vandyke*,* 6 McL., 422.

§ 550. Though husband and wife join in warranting the title to the land in which she releases her dower, the wife is not liable to the action of covenant. *Griffin v. Reynolds*, 17 How., 609.

§ 551. A married woman does not, by charging her inchoate right of dower for her husband's benefit, become a surety for him with a surety's rights. An agreement to compensate her for a release of such right of dower is not to be implied. *Hiscock v. Jaycox*,* 12 N. B. R., 507.

§ 552. Miscellaneous, as to surviving spouse.—If a deed of land be set aside in equity, after the death of the purchaser and of his widow, on account of his fraud, and the purchase money be decreed to be repaid by the heirs of the vendor to the purchaser's administrator, to be by him distributed as assets, the widow's second husband is entitled, as his distributee, to his deceased wife's third of the purchase money thus repaid. *United States v. Baker*, 2 Cr. C. C., 615.

§ 553. Will construed where widow, infant son, mother, brothers and sisters are all provided for, and a leading devise is to wife and son, and some devises are partially inconsistent with one another. *Walker v. Parker*, 18 Pet., 166.

§ 554. A settlement of personal property to the sole and separate use of the wife, "free of the control of her husband," held to vest in equity in her next of kin at her death. *Dorsett v. Marshall*,* 5 Cr. C. C., 96.

§ 555. As to the husband's right, on surviving his wife, to recover her choses in action not reduced to possession in her life-time, see *Marshall v. Dorsett*, 4 Cr. C. C., 606; and see § 161.

§ 556. An action cannot be maintained against the husband for the debt of the wife, after her death, upon an express promise made by him in the life-time of his wife, upon no other consideration than his liability, as husband, for the debt of his wife, and the property acquired by him in right of the marriage. *Callan v. Kennedy*,* 3 Cr. C. C., 630.

§ 557. The devise of property to a wife, to be held by a trustee, without any power of appointment or limitation, vests the title in the wife, and on her death, if undisposed of, it goes to her husband under the Maryland statutes. *Marshall v. Beall*,* 6 How., 70.

As to effect of will upon an ante-nuptial bond for maintenance, see §§ 815, 816.

As to bequest by wife to husband out of her separate property, see § 839.

As to tenancy by the curtesy where the guardian's relation exists, see §§ 809-812.

6. Separation and Divorce.

SUMMARY — *Wife abandoned by husband*, §§ 558, 559.—*Separation and deeds of separation*, §§ 560-565.—*Divorce*, §§ 566-568.

§ 558. Where a wife is left without maintenance or support by her husband, and trades as a *feme sole*, and as such obtains credit, she is liable for her debts; and the law is the same whether the husband is banished or has voluntarily abandoned his wife. *Rhea v. Rhenner*, §§ 569, 570.

§ 559. But, under the laws of Maryland, the wife cannot, in such case, convey her lands by a separate deed. *Ibid*.

§ 560. Deeds of separation between husband and wife for the separate maintenance of the wife, through the intervention of a trustee, are upheld, especially where the consideration is apparent, the separation to occur immediately or already continuing, and the provision a reasonable one in itself for the wife, the husband being at fault. *Walker v. Walker*, §§ 571-79.

§ 561. A provision in such deed for the continuance of the trust in case of a reconciliation and return of the wife to the husband does not affect its validity; nor does the return of the wife discharge such obligation. *Ibid*.

§ 562. A husband may thus be trustee for his wife, and, as such, be compelled in equity to account for any money and property belonging to her which he may have received, whether it was settled by him upon her or came to her through other sources. *Ibid*.

§ 563. The widow is not estopped from setting up her claim against her deceased husband for her separate property received by him by becoming a formal party to a deed of compromise between heirs and distributees from which she derives no benefit; nor by accepting a provision under the will, which, with the income under the trust deed, was to be in satisfaction of dower. *Ibid*.

§ 564. A conveyance based upon the relinquishment of marital rights upon a separation of husband and wife becomes purely voluntary when marital relations are resumed. *Kehr v. Smith*, § 580.

§ 565. In the case of a covenant with trustees, made by A. upon separating from his wife, by which he agreed not to claim any property that might come to her by descent or devise, held, that A. having, before his death, received such property, the last survivor of the trustees might sue upon the broken covenant by suit against the executors of the estate; also upon the facts that the wife had not so accepted benefits under A.'s will as to debar the action. *Crocker v. Beal*, §§ 581-84.

§ 566. Rights stated as between husband and tenant, where a married woman pledged the rents of her separate estate, held subject to her mother's dower, to her tenant for advances in a certain amount, and on being divorced from her husband during her mother's life-time, executed an instrument in conformity with the decree, whereby she ordered one-third of such rents to be paid to her husband as they should become due, for the education and support of children decreed to his custody. *Cheever v. Wilson*, §§ 585-89.

§ 567. A decree of divorce valid and effectual in the state where it is made is valid and effectual in all other states. *Ibid.*

§ 568. A wife may acquire a domicile separate from her husband whenever it is necessary or proper for purposes of procuring divorce. *Ibid.*

[NOTES.—See §§ 590-606.]

RHEA v. RHENNER.

(1 Peters, 105-109. 1828.)

Opinion by MR. JUSTICE DUVAL.

STATEMENT OF FACTS.—This case is brought up, by appeal, from the circuit court for the District of Columbia, and county of Washington, sitting in equity.

The appellee, who was complainant in the court below, filed his bill in equity in the year 1822, in the circuit court against Daniel Rhea, and Elizabeth, his wife, and William Erskine, an infant son of said Elizabeth. The bill alleges that Elizabeth Rhea, formerly Erskine, was indebted to the complainant in the sum of \$300 for goods sold and delivered; that being pressed for payment, she, with the defendant Rhea, with whom she then lived, agreed that if allowed further time they would secure the debt, by conveying to Rhenner a lot of ground, No. 165, in Beatty and Hawkins' addition to Georgetown; which was the property of said Elizabeth, and which had been conveyed to her by the name of Elizabeth Erskine. That Rhea, together with the said Elizabeth, by their deed bearing date May 13, 1819, conveyed to the complainant the lot of ground before mentioned, for the purpose of securing the debt, with interest; and stipulated that if the debt was not paid in two years it should be held in trust, with power to sell the same, and apply the proceeds, etc.

The bill further states that the said Daniel and Elizabeth, a few days before the date of the deed to the complainant, namely, on the 10th of May, 1819, but after the agreement to convey to the complainant, fraudulently conveyed the same premises to the defendant Erskine, an infant son of said Elizabeth, in fee, in consideration of natural love and affection; that he, the said Rhenner, had at a considerable expense, at the request and with the knowledge and approbation of the defendants, erected improvements on the lot, and put a tenant in possession of the same; but that the defendant, by collusion, soon after obtained possession of the same, and still keeps it, claiming to hold it under the deed to the infant. The bill concludes with praying that the deed to William Erskine may be declared void, and that the property may be sold to pay his claim, etc.

The defendant Daniel Rhea, in his answer, admits that his wife, before his intermarriage with her, namely, in May, 1819, was the wife of one Robert Erskine, and was engaged in carrying on business for herself; that he did agree to join, and did join her, in the conveyance to the complainant, and in that to her son; that he had no title or interest in the premises; that the property belonged, in May, 1819, to Elizabeth Erskine, who was a married woman, and he denies all the other allegations in the bill.

Elizabeth Rhea, in her answer, avers that she was married to Robert Erskine in January, 1812; that after her marriage, in the absence of her husband, one Adam Mayne conveyed to her the premises mentioned in the bill of complaint; the deed bears date on the 7th of April, 1817; that her husband Erskine left her in the year 1814, and she believed he was alive in May, 1819, and that she was not at that time the wife of Daniel Rhea; that in July, 1821, Erskine having then been beyond seas more than seven years, she married Daniel Rhea, having received no support from her former husband since he left her.

The answer of the infant is put in by his guardian, in the usual form, submitting to the protection of the court, without admitting or denying any of the facts alleged in the bill.

In this state of the proceedings, the court decreed a sale of the lot before mentioned for payment of the claim of the complainant; and appointed a trustee to make the sale, under the terms prescribed in the decree, reserving the claim of the complainant for proof on it and further order. From this decree there was an appeal, and the cause is now before this court for their decision. The question submitted by the arguments of the counsel is, whether the contracts and engagements of Elizabeth Rhea, made in the absence of her first husband, and prior to her marriage with the defendant Rhea, are obligatory; and to what extent a woman, who has been abandoned by her husband, may contract debts for which she is personally liable.

§ 569. *Liabilities stated where a wife is left without maintenance or support by her husband and trades as a feme sole.*

The law seems to be settled that when the wife is left without maintenance or support by the husband, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts. And the law is the same whether the husband is banished for his crimes or has voluntarily abandoned the wife. It is for the benefit of the *feme covert* that she should be answerable for her debts and liable to an action in such a case; otherwise she could not obtain credit and would have no means of gaining a livelihood. A decision to this effect, by the court of common pleas, in England, is reported in 1 Bos. & Pull, 359. In delivering the opinions of the court, Mr. Justice Buller refers to the case of Lady Belknap, whose husband was exiled. She was permitted to sue in her own name. The husband of Lady Sandys was banished by act of parliament during life, and it was decreed, in her case, that she might in all things act as a *feme sole*, and as if her husband was dead; and that the necessity of the case required she should have such power. 1 Vernon, 104. And the same reason applying where the husband had abjured the realm, the wife, in that case, was allowed to sue as a widow for her dower. In such case, she has been permitted to alien her land without her husband, and is exempted from the disabilities of coverture. It has been uniformly considered that banishment or abjuration is a civil death of the husband. In the case of Deb. Gregory v. Paul, 15 Mass., 31, all these cases are reviewed by the supreme judicial court of Massachusetts, and the law recognized.

§ 570. — *under the laws of Maryland a wife cannot, in such cases, convey her lands by a separate deed.*

In the case under consideration there was a voluntary abandonment of the wife by the husband, without having furnished her with the means of support. In his absence, she traded and dealt as a *feme sole*, and is liable for her debts. When the deed for the lot aforementioned was executed, her husband had been absent five years only; she continued under a coverture, and was the wife

of Robert Erskine, her first husband. There is no evidence that she was, at that time, married to Daniel Rhea, and if the marriage had been proved, it would have been illegal and unavailing. A *feme covert*, who has been abandoned by her husband, is not permitted to marry a second time, with impunity, until her husband shall have been absent seven years, and shall not have been heard of during that time. But by the laws of Maryland, which must govern in this case, a married woman cannot dispose of real property without the consent of her husband; nor can she execute a good and valid deed to pass real estate, unless he shall join her in the deed.

The separate examination and other solemnities required by law are indispensable, and must not be omitted. The deeds executed by her and Daniel Rhea, in May, 1819, are therefore inoperative and void.

The circuit court decreed, in this case, upon the bill annexed, and exhibits, without further testimony. They do not, in themselves, contain sufficient matter for a decree. It does not appear that any evidence was taken, on commission or otherwise, to establish or disprove the material allegations in their bill. The record being thus defective, this court cannot make a final decision. The decree of the circuit court is reversed and the record remanded for further proceedings.

WALKER v. WALKER.

(9 Wallace, 743-758. 1869.)

APPEAL from U. S. Circuit Court, District of Massachusetts.

STATEMENT OF FACTS.—Dr. Walker, a resident of Massachusetts, by his cruel treatment of his wife, compelled her to leave his house. To prevent an application for a divorce, Walker, at the advice of a friend, executed articles of separation, in which he conveyed to trustees, in trust for his wife, an amount of property previously agreed upon, the income to be paid to the wife during her life. The provision was made in lieu of dower and alimony. After living separate for a short period, Mrs. Walker returned to her husband's house, at his request, and during the time she thus lived with him she delivered to him the checks received on account of the income of the trust property, but at his solicitation, and on his promise to invest the proceeds for her benefit. She was again compelled to leave his house, and Walker died without having invested the money as agreed, but leaving a will in which he secured to his wife a certain annual income. Letters testamentary were granted in Rhode Island, where Walker died, and ancillary letters were also granted in Massachusetts.

This bill by Mrs. Walker seeks to charge Walker's estate with a trust, on account of the moneys received as above and not invested.

Opinion by MR. JUSTICE DAVIS.

The bill here seeks to charge the estate of Dr. Walker, in the hands of his executors, with a trust in favor of his widow. The court below found that the trust existed and was valid, and this appeal seeks to review that decision as erroneous.

Two principal questions are presented for consideration: 1st. Is the trust created by the articles of separation in this case valid, and will a court of equity enforce it? 2d. Can a husband be a trustee for his wife; and, if so, did Dr. Walker constitute himself such a trustee or not?

§ 571. *Deeds of separation between husband and wife, for the separate maintenance of the wife, through the intervention of a trustee, how far upheld.*

It is contended that deeds of separation between husband and wife cannot

be upheld, because it is against public policy to allow parties sustaining that relation to vary their duties and responsibilities by entering into an agreement which contemplates a partial dissolution of the marriage contract. If the question were before us, unaffected by decision, it would present difficulties, for it cannot be doubted that there are serious objections to voluntary separations between married persons. But contracts of this nature for the separate maintenance of the wife, through the intervention of a trustee, have received the sanction of the courts in England and in this country for so long a period of time that the law on the subject must be considered as settled. *Compton v. Collinson*, 2 Brown's Ch., 377; *Worrall v. Jacob*, 3 Meriv., 266; *Jee v. Thurlow*, 2 Barn. & Cres., 546; *Webster v. Webster*, 1 Smale & Gif., 489; S. C., 23 Eng. L. & Eq., 216; 17 id., 278; *Randle v. Gould*, 8 Ell. & Bl., 457; *Carson v. Murray*, 3 Paige, 483; *Nichols v. Palmer*, 5 Day, 47; *Hutton v. Duey*, 3 Barr, 100; *Bettle v. Wilson*, 14 Ohio, 257; *Chapman v. Gray*, 8 Ga., 341; *Reed v. Beazley*, 1 Blackf., 97; *Wells v. Stout*, 9 Cal., 494; *Dellinger's Appeal*, 35 Penn., 357; *Gaines v. Poor*, 3 Met. (Ky.), 503; *Hunt v. Hunt*, 5 Law T. Rep., 778.

§ 572. — *especially where the consideration is apparent, the separation to occur immediately or already continuing, and the provision a reasonable one for the wife, the husband being at fault.*

It is true that different judges, in discussing the question, have struggled against maintaining the principle; but while doing so they have not felt themselves at liberty to disregard it, on account of the great weight of authority with which it was supported, and have, therefore, uniformly adhered to it. It is unnecessary to consider whether the extent to which the doctrine has been carried meets our approbation, nor are we required to discuss the subject in any aspect which this case does not present. It is enough for the purposes of this suit to say that a covenant by the husband for the maintenance of the wife, contained in a deed of separation between them, through the medium of trustees, where the consideration is apparent, is valid, and will be enforced in equity, if it appears that the deed was not made in contemplation of a future possible separation, but in respect to one which was to occur immediately, or for the continuance of one that had already taken place. And this is especially true if the separation was occasioned by the misconduct of the husband, and the provision for the wife's support was reasonable under the circumstances, and no more than a court, before which she was entitled to carry her grievances, would have decreed to her as alimony. In this state of the law on the subject, it is clear the deed of settlement in controversy was unobjectionable. It is equally clear that the separation accomplished by it was the best thing for the parties at the time, and that it ultimately led to a reunion which lasted over fourteen years. The evidence shows that the bad conduct of Dr. Walker to his wife justified her in leaving him, and entitled her to a legal separation at the hands of a court, with alimony in proportion to the value of his estate. For many reasons, which are apparent without stating them, it was desirable, if possible, to avoid a judicial investigation, and accordingly negotiations to this end were commenced on the part of the husband, which resulted in securing to the wife a suitable provision for her support. This settlement was made by him, and accepted by her, not only in lieu of alimony, which she could have obtained, but also in place of dower; and the covenant of the trustees against any future claim of alimony, and their agreement that the wife's debts should be paid out of the property conveyed to them, furnished the

security to the husband for the permanent arrangement contemplated by the parties. If we consider that the value of the property transferred to the trustees for the benefit of the wife was but little more than the husband received in her right from her father's estate, and that, at the time, he was worth between three and four hundred thousand dollars, it would seem the provision for the wife's maintenance was less than she had a right to demand and ought to have received. If the law authorizes a wife to leave her husband on account of cruel treatment, and to get from him a competent support, it cannot withhold its sanction to the articles of separation concluded between these parties under the circumstances disclosed by the evidence in this case.

§ 573. — *a provision in such deed for the continuance of the trust in case of a reconciliation and return of the wife to the husband does not affect its validity; nor does such return.*

It is insisted the obligation of the trust was discharged when the wife returned to her husband's house, but this is a mistaken view of the effect of the instrument. It was the intention of the parties that the arrangement should be permanent, and to accomplish that purpose the agreement was framed so that the wife should enjoy her separate estate during life, although she should subsequently become reconciled to her husband, and cohabit with him. We can see no valid objection to such a provision, and it is certainly supported by authority. *Wilson v. Mushett*, 3 Barn. & Ad., 743; *Bell on Husband and Wife*, 525-541. The husband had a right to make a settlement upon his wife without any view to separation, and the insertion of this provision shows that he did not intend the settlement to cease on the return of the wife to cohabitation. There is no good reason why effect should not be given to the intention of the parties on the subject. If, on grounds of public policy, it is desirable that the parties should be reconciled, whatever tends to promote such a result will receive the favorable consideration of a court of equity. Without this provision there was no inducement for Mrs. Walker to return to her husband; with it she could try to live with him again, and if his previous bad treatment was repeated she was fortified against the contingency of being turned away another time penniless. There was nothing in his previous conduct to inspire her with confidence in his subsequent good behavior, and but for the fact that the means of support were secured to her in case her life became intolerable with him, it is reasonable to infer that she would never have ventured to cohabit with him after the separation. It is clear, then, that this trust was operative during the life of the wife, and that a court of equity will enforce it.

§ 574. *A husband may be trustee for his wife, and as such be compelled in equity to account for any money and property belonging to her which he has received.*

The next inquiry relates to transactions which occurred after the wife returned to her husband at his request, and on which the claim for relief in this case is based. That a husband may be a trustee for his wife, and can be compelled in equity to account for any money or property belonging to her which he has received, in the same manner that a stranger would be held to account, is a doctrine so well settled that it hardly requires a citation of authorities to sustain it. 2 Kent, 163, and cases cited; 2 Story's Eq., § 1380; *Neves v. Scott*, 9 How., 212 (§§ 332-35, *supra*); *Woodward v. Woodward*, 8 Law T. Rep. (N. S.), 749; *Grant v. Grant*, 12 id., 721.

It makes no difference whether the property which he has received was settled by him upon his wife, or came to her through other sources. If the

property was her own separate and exclusive estate, and he has agreed to become her trustee respecting it, his liability attaches, and he will be charged with the trust. The property settled upon Mrs. Walker by the articles of separation was her separate estate, and to be enjoyed by her in the same manner as if it had been conveyed to trustees for her benefit, by settlement before marriage. The income secured to her was not suspended by her returning to live with her husband on his solicitation, nor had he any right to retain it by way of set-off against the expense of her living. If for any cause he desired the state of separation to cease and invited his wife to return, it was his duty as it should have been his pleasure, out of his abundant means, to have given her a decent support. What is the evidence touching the question whether Dr. Walker constituted himself the trustee for his wife in respect to the income derived from her separate estate?

It is clear and uncontradicted that Dr. Walker received the rents and incomes of his wife's estate *from her*, on the condition to which he agreed, that he would invest them for her benefit as they were received, and this agreement imposed on him the character of a trustee as to this property. To hold otherwise would be to sanction the grossest fraud. It is not necessary to create the trust that the husband should use any particular form of words, nor need those words be in writing. All that is required is that language should have been employed equivalent to a declaration of trust. That the words which Dr. Walker used constituted him the trustee of his wife cannot admit of controversy. An attempt is made to discredit the principal witness, by whom the important facts in this case are proved, but it has wholly failed. Her narrative of the occurrences which led to the separation, and of the transactions out of which the trust arises, is intelligently given, does not vary on cross-examination, and bears the impress of truth.

§ 575. *Jurisdiction of circuit courts over executors and administrators where parties are citizens of different states.*

It is insisted that this suit should have been brought in Rhode Island, because Dr. Walker had his domicile in that state when he died, and his will is proved there. But the will was also proved in Massachusetts, where ancillary administration was obtained; and if, as is conceded in such a case, the assets received and inventoried by the executors there are liable to the claims of the citizens of Massachusetts, the citizens of other states will be placed on the same footing in this respect, in the federal courts sitting in Massachusetts, where there is no suggestion of insolvency. The circuit courts of the United States, with full equity powers, have jurisdiction over executors and administrators, where the parties are citizens of different states, and will enforce the same rules in the adjustment of claims against them that the local courts administer in favor of their own citizens. *Green v. Creighton*, 23 How., 90; *Harvey v. Richards*, 1 Mason, 381.

§ 576. *Widow is not estopped from setting up her claim because a formal party to the deed of compromise, receiving no benefit.*

It is urged that Mrs. Walker is estopped from setting up this claim because she was a party to the indenture of compromise. But if so, she was only a formal party to it, received nothing under it, and was not concerned with the residue of the estate which it proposed to adjust only after the debts, legacies and liabilities were paid. Having done nothing to conceal her claim, nor imposed upon the parties to the compromise respecting it, she cannot be considered as having waived her right to prosecute it.

§ 577. — *nor by accepting a provision under the will making, with income under the trust deed, a satisfaction of her dower.*

But if this defense is overruled it is nevertheless contended that Mrs. Walker, by accepting the provisions of her husband's will, waived her right to institute this suit; but this is giving an effect to the acceptance not warranted by the terms of the will or anything connected with the case. Dr. Walker in his will saw fit to make a limited provision for his wife and to declare that it was to be received, with the income under the trust deed, in full satisfaction of dower in his estate. Nothing is said about the other trust under which he received the separate property of his wife to be invested, and it is hard to see how his estate can be released from accounting for it, or the *status* of the complainant affected because she consents to take under the will what is given her in satisfaction of dower.

§ 578. *A defense that the suit was premature not available at this late stage.*

It is objected that the executors are not liable to this suit because it was commenced within one year after they gave bonds for the discharge of their trust. See Gen. Stat. of Mass., c. xcvi, § 16. But this defense is not now open to the respondents. To have availed themselves of it it was necessary that it should have been presented at the earliest stage of the proceedings. In not doing so they will be considered as having waived their right to insist that the suit was brought too soon.

§ 579. *Various exceptions to the master's report; computing interest and disallowing compensation where trustee was culpable.*

The remaining questions in this case relate to the exceptions of the parties to the master's report. In dealing with these exceptions it seems to us that all we are required to notice are embraced in three different points of inquiry: 1st. Did the master err in allowing Dr. Walker \$2,400 as a deduction from the income of the trust property? 2d. Should the interest charged against the trustee be compounded annually or semi-annually? 3d. Was the trustee entitled to any compensation for his services?

The solution of the first inquiry depends on the effect to be given to the receipt or memorandum signed by the complainant, dated March 27, 1847. The complainant insists in the adjustment of the account the master mistook the effect of the instrument, and that he should have allowed as a credit against her \$1,500 instead of \$2,400. It is not easy, after this lapse of time, to tell the exact basis on which the accounts should be settled with reference to this receipt. It was a memorandum made when the parties were living in harmony, and after Dr. Walker had undertaken to invest for his wife the first check delivered to him by her, and after her purpose was manifest that the entire income of her estate should be invested to provide against the contingencies of the future. And yet this memorandum shows that she so far modified this purpose as to authorize her husband to give for her \$1,200 to each of her two sons, and expressed the intention of making an equal donation to her other children. The matter was probably adjusted between the parties, and, although there is no proof on the subject, the circuit court, doubtless, in approving this part of the master's report, acted on the idea that by long acquiescence it should be treated as having been settled. We cannot say that this view of the subject is wrong, and the exception is, therefore, overruled.

2d. The next exception relates to the manner of computing interest. That Dr. Walker acted in utter disregard of his trust is too plain for controversy. He treated the money as his own; neither kept nor rendered any account of

his trust; and his conduct throughout is irreconcilable with the intention to perform his agreement. There is not a shadow of excuse for his neglect. The reason assigned for it to his daughter, when on his sick-bed, that he had not been able to find safe investments for the money, was the merest pretense. It could not be otherwise, as he was an intelligent man, of large wealth, and well informed on the subject of investing moneys. The condition of his estate shows that he had abundant opportunities for profitable investment on his own account; and if so, how can it truthfully be said he could not find safe investments for the small sums in his hands belonging to his wife? A court of equity, the especial guardian of trusts, will not tolerate excuses of this sort on the part of a trustee, for omitting to discharge his duty to his *cestui que trust*. There is, therefore, no hesitation in the court to allow, in the adjustment of the trustee's account, the interest to be compounded annually. It has been argued with earnestness that this is a case for severe treatment, and that the master should have allowed semi-annual rests; but we are not at liberty to discuss the subject, as the court are equally divided in opinion upon the question which it presents.

3d. The master was wrong in allowing any compensation to the trustee for his services, and the exception taken to that part of his report is, therefore, sustained. To hold that, in a case like this, the trustee should be allowed compensation, when he literally did nothing towards executing his trust, but on the contrary was guilty of the grossest abuses concerning it, would be a departure from correct principle. The sustaining this exception renders a modification of the decree in the circuit court necessary. That court passed a decree in favor of the complainant for \$81,750.85. It should have been increased by the addition of \$1,682.38, which sum was deducted, in the account stated, for the trustee's services. The decree of the circuit court is, therefore, modified, on the basis that the complainant, at the time it was rendered, was entitled to recover from the respondents the sum of \$83,433.23.

Interest will follow from the date of the decree, at the rate allowed on judgments and decrees in Massachusetts. (a)

KEHR v. SMITH.

(30 Wallace, 81-86. 1878.)

APPEAL from U. S. Circuit Court, Eastern District of Missouri.

STATEMENT OF FACTS.—Meyer and his wife separated. Meyer executed a deed by which he conveyed to Kehr, as trustee, a house and lot to secure two notes of \$2,500 each, which, with \$2,000 cash, he settled upon his wife, she relinquishing all claim on him for dower, alimony, etc. In less than three months the couple became reconciled and lived together, the deed, however, being allowed to stand as a settlement upon Mrs. Meyer. Meyer afterwards became bankrupt, and his assignee brought this suit to subject the property to the payment of Meyer's debts, and to set aside the conveyance as voluntary. It appeared that, after subtracting the \$7,000 so settled upon his wife, Meyer had not more than enough to pay his debts at the time of the conveyance to Kehr. The decree was in favor of the assignee, and Kehr and Mrs. Meyer appealed.

(a) Affirming *Walker v. Beal*, 3 Cliff., 155. And see *Rolette v. Rolette*, 1 Burn. (Wis.), 226.

§ 580. *A conveyance based upon the relinquishment of marital rights upon a separation of husband and wife becomes purely voluntary when marital relations are resumed.*

Opinion by MR. JUSTICE DAVIS.

It is unnecessary to discuss the question whether the settlement made in view of actual separation could be upheld or not in the condition of the husband's affairs, because this case must turn on what occurred afterwards. All the elements of value which entered into the composition of the first agreement ceased to exist when the parties became reconciled. The marital relations were resumed on the basis of mutual forgiveness for past misconduct, and the wife became entitled to support from her husband, and to dower in his estate. These rights of the wife had been relinquished in the first contract, and this relinquishment was the only consideration to support it. The withdrawal of the consideration left the notes without any element of value in them, and the execution of the new contract, followed by cohabitation, placed the parties exactly where they would have been if there had been no separation. The notes thus became a voluntary gift, and it can make no difference in their character that they are reserved as a separate estate to the wife. It is not a question in the case whether, as between the parties, they could not be enforced. The question is whether a husband, at the time largely indebted, can make a voluntary donation, or even voluntary conveyance, to his wife to the prejudice of his creditors. An attempt is made to show that Meyer received from his wife a considerable amount of money obtained by her from her first husband's estate, and that this formed part of the consideration of the settlement when they separated; but there is no evidence of any value to prove such a state of things. Besides, the articles of separation decide this point against the wife, as no notice is taken of it, and it is hardly possible, if the fact were as claimed, that, on such an occasion, it would not have been mentioned.

In this controversy, therefore, with creditors, the gift must be treated as purely voluntary; a gift being nothing more than the transfer of property without consideration.

We could not profitably add anything to what has been so well said by the district judge in his opinion in this case on the subject of the indebtedness and property of Meyer at the time of the settlement upon his wife. On a careful consideration of the whole evidence, we are satisfied that the value of the property was not materially different from the estimate he put upon it. If he erred at all in this estimate, it was within a very narrow limit. The homestead on which the notes were secured was the only piece of real estate of any consequence owned by Meyer, and witnesses differed as to its value, but the opinion of one was sustained by what it brought at the sale, which was the criterion of value adopted by the district court. In this he may have been mistaken, but if so, the mistake was within the limits of \$2,000, which the circuit court thought was about the worth of the property. Outside of the homestead the assets of Meyer were uncertain, but they did not exceed, if they equaled, the estimate of the district court. The conclusion reached by that court, after going into particulars, was that the estate of Meyer could not have exceeded the sum of \$16,132. Deducting from this the sum of \$7,000 paid, and agreed to be paid, to the wife, would leave \$9,132 to meet debts confessedly due, amounting to \$9,306.

§ 580a. *A post-nuptial settlement out of proportion to the means of the husband is constructively fraudulent.*

Surely the voluntary provision for the wife in such a condition of things is not sustainable against existing creditors. Nor can it be supported on the theory that the whole estate was worth a few thousand dollars more. Suppose it was, there would still be that extent of embarrassment which would have a direct tendency to impair the rights of creditors. In such a case a presumption of constructive fraud is created, no matter what the motive which prompted the settlement. Meyer was not only largely indebted for a person in his situation, but it is easy to see it would have been close work for his creditors to have made their debts, if they had tried to enforce their collection by judicial process, a surer way of ascertaining the real worth of the property than by the opinions of indifferent persons, as experience has proved that this kind of testimony is often unreliable on such a subject. The ancient rule that a voluntary post-nuptial settlement can be avoided, if there was some indebtedness existing, has been relaxed, and the rule generally adopted in this country at the present time will uphold it, if it be reasonable, not disproportionate to the husband's means, taking into view his debts and situation, and clear of any intent, actual or constructive, to defraud creditors. See the note to *Sexton v. Wheaton*, 1 Am. Lead. Cas. (5th ed.), page 37, where the law on this subject is fully considered.

Testing this settlement by this rule, it must be taken to be in bad faith towards existing creditors, as, clearly, it was out of all proportion to the means of the husband, considering his state and condition, and seriously impairs his ability to respond to the demands of his creditors.

§ 580b. *When a deed is avoided as to existing creditors, all creditors share pro rata.*

It is well settled, where a deed is set aside as void as to existing creditors, that all the creditors, prior and subsequent, share in the fund *pro rata*. *Magawley's Trust*, 5 De Gex & Sm., 1; *Richardson v. Smallwood*, Jacob, 552-558; *Savage v. Murphy*, 34 N. Y., 508; *Iley v. Niswanger*, Harp. Eq., 295; *Robinson v. Stewart*, 10 N. Y. (6 Seld.), 189; *Thompson v. Dougherty*, 12 Serg. & R., 448, 455, 458; *Hoke v. Henderson*, 3 Dev., 12-14; *Kissam v. Edmundson*, 1 Ired. Eq., 180; *Sexton v. Wheaton*, 1 Am. Lead. Cas., 45; *Norton v. Norton*, 5 Cush., 529; *O'Daniel v. Crawford*, 4 Dev., 197-204; *Reade v. Livingston*, 3 Johns. Ch., 481-499; *Townshend v. Windham*, 2 Ves., 10; *Jenkyn v. Vaughan*, 3 Drewry, 419-424.

We have considered the contract in this case as if it were executed, because no point is made by the respondents that it is executory, and the case has been argued by both sides on the theory that the law applicable to an executed contract of this sort applied to the one in controversy. It may well be doubted whether in any case a mere promise by the husband, without consideration, to pay money to the wife at a future time, can be enforced against the claims of creditors.

Decree affirmed.

CROCKER v. BEAL.

(Circuit Court for Massachusetts: 1 Lowell, 416-430. 1869.)

STATEMENT OF FACTS.—Dr. Walker, upon separating from his wife, entered into a covenant with three trustees, by which he agreed not to claim any property that might thereafter come to his wife by descent or devise. He

afterwards received money that came to his wife from her deceased brother. This action for a breach of the covenant was brought by the last survivor of the three trustees against the executors of Dr. Walker.

§ 581. *A survivor of three trustees can sue alone upon a joint covenant.*

Opinion by LOWELL, J.

Upon the first point the ground taken is, that the surviving trustee cannot sue alone. But the law is that upon a joint covenant the survivor alone can sue. 1 Chitty, Pleading, 11; *Anderson v. Martindale*, 1 East, 497; 2 Walford on Parties, 1527. It is said, and truly, that the indenture provides for filling vacancies, and for keeping the number of trustees always at three; but whether new trustees could sue for an old breach of covenant, we need not inquire, because none have been appointed, and the defendants have no concern with that matter, at least in this court. If any person interested chooses to apply to the probate court, no doubt the vacancies may be supplied, but in the meantime the plaintiff has this cause of action vested in him by survivorship.

§ 582. *The rule is that one cannot accept a benefit under a will and repudiate it in any part. But that legacy was intended as satisfaction is not inferred.*

The other defense is that Mrs. Eliza Walker, on whose behalf and for whose sole benefit this covenant was made, has taken an interest under her husband's will, inconsistent with the assertion of the right sought to be vindicated in this action. This is pleaded as an accord and satisfaction and as a release. Granting that these defendants can set up this defense, which the case cited of *Bonaffé v. Woodberry*, 12 Pick., 456, seems to show that they may, and that it is properly pleaded, which it seems to be, yet I am of opinion that the facts do not support it as a bar to this action. It is undoubtedly true that where provision is made in a will for the benefit of any one, he cannot both accept that benefit and repudiate the will in any part. Thus a widow, who has an estate left to her in lieu of dower, cannot, after voluntarily accepting the provision, demand to be endowed; and there are many like cases. And the rule prevails in this country at law as well as in equity. In equity the party is put to an election; and even at law, this can sometimes be done, as where a paid legatee disputing the will was required to pay the amount of his legacy into court. *Hamblett v. Hamblett*, 6 N. H., 333. But courts of law find much greater difficulty in dealing with such a case, and, as I understand, will not hold the devisee or legatee to be barred, unless it is clear that he has made an irrevocable election. See the remarks of Lord Redesdale, 2 Sch. & Lef., 450. If there is doubt on that point, the executor must be left to his remedy in equity, where full and complete justice can be done to both parties.

When the question is whether a legacy is intended as satisfaction for a debt, the same general rule prevails, but all intendments of law are against the inference of such an intent. See *Chancey's Case*, 2 Lead. Cases in Eq. (318) and notes to Am. ed.; *Strong v. Williams*, 12 Mass., 391. Very slight circumstances will avail to negative any such presumption, as, for instance, the mere fact that the testator has directed all his debts and legacies to be paid, or that the legacy is less beneficial in any respect, though more so in others, than the debt. In the present case, the testator leaves a fund to trustees to divide the income, and eventually, after the lapse of many lives, the principal, among his six children and their representatives, and directs that, if necessary, the trustees may, in their discretion, out of the income of this fund, pay his wife enough to make her income up to \$3,000 a year, if the income of the

property settled by the indenture should fall short of that sum; and adds, "I having included in the sum given in the second item above (that is, the trust fund) any amount of money that in equity or honor may be due to my said wife or children by heirship from her late father or brother, Joseph Heard, deceased. And it is my design and intention that the provision herein made, coupled with the amount secured to her by said indenture, shall be in full and in lieu of her dower in my estate." He then gives the bulk of his estate to certain charities.

§ 583. *Construction of a will as to a legacy being a satisfaction of a debt.*

Here is a very clear intent expressed to bar dower; but it is by no means so clear that he intended this provision to be a satisfaction of the amount due this plaintiff for the benefit of his wife. It is mainly a provision for his own children, of which he says that one inducement is that he may in equity and honor owe them and their mother something for what he received from the estate of this brother and some one else. He acknowledges no legal obligation, and does not assert that he is making any satisfaction. The provision for his wife is only contingent, and at the discretion of his trustees. Considering the great care and minuteness with which such matters are provided for in the will, I find it difficult to understand this ambiguous declaration as meaning that his wife, if she takes any income in any year, shall not be paid this debt. Suppose she does not take it; the trust fund remains the same, only her children get a somewhat larger income. The defendants must read this will as meaning that, in consideration of a debt due his wife, he leaves certain property in trust for their children, out of which the wife may in certain contingencies and on some occasions, at the discretion of his trustees, have an income. What is there for her to elect? She cannot elect that the trust fund shall not be created, nor that her children shall not have the income. If the question were between her and the children, I can understand that she might be required to choose. But suppose the children all assent to her having this income, what concern have the executors with the question?

§ 584. *The acceptance of a single payment of an annuity or a legacy does not conclude the legatee's right to elect.*

If she is put to such an election, the evidence does not show that she has made the same so conclusively that a court of law will hold her barred. It seems that she has accepted one instalment of income and has refused all others. If there be any inconsistency, then the suffering this action to be brought may be an election, and the trustees may refuse to pay her any more income. This will work exact justice, and will require the point to be settled in equity, where this question of election can be more properly dealt with.

I find as matters of fact: (1) That the indenture referred to in the plaintiff's declaration was made as therein set forth; and that the plaintiff is the sole survivor of the three trustees named in said indenture. (2) That after the making of the indenture the defendant's testator received the sum of \$5,964.39, which came to his wife, Eliza Walker, from the estate of her brother, Joseph Heard, who died after the date of said indenture, whereby he broke the covenants thereof. (3) That said Eliza Walker received the sum of \$145.51, on 14th July, 1866, as an addition to her income for the year 1865-6, under the third item of said testator's will; and that she has refused to receive any further sums under said item of said will.

And as matters of law: (1) That said indenture is valid. (2) That the plaintiff, as the sole survivor of the three trustees named in said indenture,

may well have and maintain this action, and is entitled to recover said sum of \$5,964.39, with interest at six per cent. per annum, from the dates of the payments respectively, and his costs. (3) That said cause of action has not been released by the act of said Eliza above mentioned.

Judgment for the plaintiff

CHEEVER v. WILSON.

(9 Wallace, 108-124. 1869.)

APPEAL from the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The material facts of the case, as disclosed in the record, are as follows:

On the 6th of September, 1842, Cheever and the defendant Annie, then Annie J. Hughes, executed a deed of marriage settlement, whereby the title of the real estate therein described, situate in the city of Washington, was vested in Sarah T. Hughes, the mother of Annie, "in trust, to permit her daughter, the said Annie J. Hughes, to receive, take and enjoy the rents and profits of the said lands and premises to her sole and exclusive use and benefit," etc. The property embraced in the settlement is designated in the proceedings as "the Avenue property," and "the Sixth street property." On the 8th of September, 1842, the parties were married. On the 10th of September, 1855, Mrs. Cheever and Mrs. Hughes executed to the defendant Wilson a lease of the avenue property for five years, from the 1st of October, 1855, at an annual rent of \$1,300, to be paid quarterly. On the 26th of November, 1856, they executed a deed of trust to Carlisle and Maury, to secure certain advances therein mentioned, made, and to be made, by the defendant Wilson, to Mrs. Cheever.

This deed refers to the lease and authorizes Wilson, after the 1st of October, 1857, to retain and apply the rents to the indebtedness until it should be extinguished. On the 11th of February, 1857, Mrs. Cheever executed to Wilson a paper purporting to assign to him all the rents then due and thereafter accruing until he should have received the sums therein mentioned. A further lease was given by Mrs. Hughes and Mrs. Cheever to Wilson, on the 16th of July, 1857, of the avenue property, for the term of five years, to commence on the 1st of October, 1860, at the same rent, to be paid in the same manner as was provided in the former lease. Mr. and Mrs. Cheever lived together in Washington until December, 1854, when they separated. On the 16th of June, 1857, Mrs. Cheever filed her petition for a divorce in the circuit court of Marion county, Indiana. She described herself therein as a *bona fide* resident of that county. The cause was removed by an order for a change of venue to the circuit court of Madison county, in that state. On the 19th of August, 1857, Cheever appeared and filed his answer and a cross-petition. On the 26th of that month the court decreed a divorce *a vinculo matrimonii*, and thereafter, by the agreement of the parties, it was further decreed that Cheever should have the custody of the three elder children, and that Mrs. Cheever should have the custody of the younger one until the further order of the court, and that for the support and education of the children Cheever should receive one-third of the rents and profits, to which Mrs. Cheever was entitled, accruing from the property described in the deed of settlement. The decree declared "that the same is hereby decreed to the said Benjamin, as the same shall here-

after become due and payable, for the uses and purposes of the said infant children during the life-time of the said Annie." . . . "And the said Annie shall execute to the said Benjamin a good and sufficient power to receive said rents and profits for the uses and purposes herein declared, which shall be sufficient for the purpose." On the 27th of August she executed such an instrument pursuant to the decree; but before doing so she added this sentence to the draft which had been prepared: "This assignment of rents is subject to an incumbrance upon said rents to my agent, Jesse B. Wilson, of about \$5,000." Her interest in the rents at the date of the decree was two-thirds in possession, and the remaining third expectant upon the death of her mother, who received that portion for her dower. Notice of the decree was given to Wilson within a very short time after it was rendered. He did not recognize the complainant's claim, and has never paid him anything.

Soon after the divorce was granted Mrs. Cheever married Louis Worcester. On the 11th of December, 1858, Worcester and wife gave to Wilson an instrument whereby they assigned to him all her rents until he should have received the sum of \$3,000. On the 30th of December, 1858, Worcester and wife and Mrs. Hughes gave to Wilson an extension of his lease of the avenue property for the term of ten years, from the 1st of October, 1860, being an addition of five years to the term of the last preceding lease. At the same time Mr. and Mrs. Worcester executed to him a further assignment of the rents. The avenue buildings were destroyed by fire in April, 1862. Wilson erected the present store on the property at a cost to himself of upwards of \$4,000. He has continued to occupy it, and has paid no rent since the fire to any one.

Mrs. Hughes died on the 12th of April, 1863. Worcester died before that time. On the 22d of October, 1863, Wilson and Mrs. Worcester came to a settlement of their accounts. He had collected the rents of the Sixth street property up to that time, but did so no longer. The accounts embraced the rent received from that property as well as that from the avenue property, and extended to the period of the fire. The result was that she was found to be indebted to him in the sum of \$3,290.

The complainant's bill was filed the 21st of June, 1858, and seeks a specific performance of the Indiana decree against Wilson, as to the portion of the rents allotted to the complainant for the benefit of the children. On the 17th of June, 1863, it was ordered by the court that the auditor should report upon the state of the accounts between Mrs. Worcester and Wilson. There was no finding as to the rights of the parties, and no specific directions were given in the order.

The auditor made a very elaborate report. Assuming the Indiana decree to be valid, his conclusions were that the balance due to Wilson for his advances on the faith of the pledges of the rents prior to the divorce, or his having notice and at the time of notice — which the auditor found to be the 11th of September, 1857 — was \$4,627.78, including interest, and that this balance was extinguished on the 1st of January, 1863, leaving an overplus of \$23.30; that there was due to the complainant the sum of \$622.97, including interest for rents from the time of the payment of Wilson's advances to the 1st of January, 1865, the last quarter-day before the adjustment by the auditor, and the further sum of \$2,437.41 and interest, for rents from the date of the decree to the time the advances were paid; that the amount of the rents accruing from the time of the payment of the advances to the 1st of March, 1865, from the avenue property, as well as the Sixth street houses, while the

defendant collected the rents of the latter, excluding the third which fell in by the death of Mrs. Hughes, was \$1,831.84; that the amount due to the complainant was, therefore, \$3,060.38, and that the sum in the hands of the defendant, Wilson, applicable thereto in payment, \$1,831.84, was not sufficient to pay complainant's arrears by the sum of \$1,295.58.

According to the report the claimant is entitled to a decree against Wilson for the sum of \$1,831.84, with interest from the 1st of March, 1865, and for the further sum of \$1,295.58 against Mrs. Worcester, with interest from the same time. The sum proposed to be decreed against Wilson is made up of two elements: (1) the complainant's share of the rents received by Wilson after his advances were paid, with interest down to March 1, 1865, being \$622.97; and (2) the share belonging to Mrs. Worcester of the rents accruing after the same period (excluding her mother's share, which lapsed by her mother's death), with interest computed also to the 1st of March, 1865, being \$1,208.87, these sums making together the aggregate of \$1,831.84. The auditor held that Wilson was liable for the latter sum, because the complainant was entitled to it, on the principle of subrogation. All the parties excepted to the report. The court sustained the defendants' exceptions, and dismissed the bill upon the ground that the Indiana decree was void.

§ 585. *A married woman has the same power as a feme sole to incumber rents settled in trust for her sole and exclusive use and benefit.*

Upon the execution of the deed of settlement, the real estate therein described became the separate property of Mrs. Worcester, and she had the same power to anticipate and incumber the rents as if she had been a *feme sole*. Colvin v. Currier, 22 Barb., 387; Heatley v. Thomas, 15 Ves. Jr., 596; Bullpin v. Clarke, 17 id., 365; Jaques v. Methodist Church, 17 Johns., 548; North American Coal Co. v. Dyett, 7 Paige, 9; Insurance Co. v. Bay, 4 Comst., 9; Gardner v. Gardner, 22 Wend., 526; Browning v. Coppage, 3 Bibb, 37; 1 Story's Eq., § 64.

§ 586. *Conclusion of the auditor stated and approved.*

The proportion of the rents to which the complainant was entitled was one-third of the two-thirds to which Mrs. Worcester was entitled at the time of the rendition of the decree in Indiana. The decree had reference to her rights as they existed at that time. It was not affected by the falling in of the other third, which her mother held as her dower to the time of her death.

The complainant was not bound by the lease of December, 1858. It was executed after the decree and notice to Wilson. He was bound by the preceding lease of July, 1857, which was executed before the decree. That lease contained a covenant on the part of Wilson to repair and pay rent. It did not expire until October 1, 1865. The buildings on the avenue property destroyed by fire in April, 1862, were insured in the name of Mrs. Hughes for \$4,000, and she received that amount from the insurance company. The lease of 1857 fixed the amount of the rent, and the complainant is entitled to claim accordingly.

Under the lease of 1858, important questions may arise between Wilson, Mrs. Worcester, and the estate of Mrs. Hughes, but they do not affect the rights of the complainant in this litigation, and we need not therefore consider them. It was proper, under the circumstances, to include in the accounts the rents received by Wilson from the Sixth street property. That property was embraced in the deed of settlement and in the Indiana decree. The record of that case was filed with the bill as an exhibit, and became a part of it. The

prayer of the bill is for general relief. The securities given by Mrs. Worcester embraced alike the rents accruing from that and the avenue property. Wilson had applied and credited both. It would not be proper to withdraw and separate the former.

It appears by the complainant's exceptions that he objected strenuously in the court below to the findings of the auditor, as to the state of the accounts between Wilson and Mrs. Worcester touching the advances. After a careful consideration of the evidence, we are satisfied with his conclusions, and see no reason to disturb them. We do not think anything would be gained to the interests of justice by modifying the report, or by setting it aside, and ordering a further examination of the subject.

We think the auditor was right in his conclusion upon the point of subrogation. A much larger amount of the complainant's share of the rents than this principle will give him of hers was applied in payment of Wilson's advances. It is proper that an equal amount of her share, according to her rights, as they were when the decree was rendered, should replace what had been so applied for her benefit. This will leave, unaffected by this ruling, for her enjoyment, the full third which had belonged to her mother, and to which she became entitled at her mother's death. We are satisfied with the auditor's findings as to the amount for which the defendants respectively should be held liable. Their exceptions should have been overruled.

The decree rendered in Indiana, so far as it related to the real property in question, could have no extraterritorial effect; but, if valid, it bound personally those who were parties in the case, and could have been enforced in the *situs rei* by the proper proceedings conducted there for that purpose. *Sutphen v. Fowler*, 9 Paige, 280; *Massie v. Watts*, 6 Cranch, 148, 158; *Swann v. Fonnereau*, 3 Ves. Jr., 44; *Portarlington v. Soulby*, 3 Mylne & K., 104; *Monroe v. Douglass*, 4 Sandf. Ch., 185; *Shattuck v. Cassidy*, 3 Edw. Ch., 152; 1 Story's Eq., §§ 743, 744. But no question arises upon that subject. The assignment executed by Mrs. Worcester to the complainant of the 27th of August, 1857, in pursuance of the decree, was ample to vest in him the interest and authority which the court ordered her to convey. The reservation in behalf of Wilson was only what the law without it would have prescribed, and did not impair its efficacy or limit what would otherwise have been the scope of its effect and operation.

§ 587. *One disputing the validity of a state decree of divorce should raise the issue in his pleadings.*

The main pressure of the arguments here has been upon the question of the validity of the Indiana decree. Those at the bar were confined to that subject, and the printed briefs go but little beyond it. The courts of the United States take judicial notice of the laws and judicial decisions of the several states. *Pennington v. Gibson*, 16 How., 80. Upon looking into the laws of Indiana we find that the proceedings in the case there were governed by "An act regulating the granting of divorces, nullification of marriages, and decrees and orders of court incidental thereto," approved May 13, 1852. The petition makes a case within the statute. It alleges that the petitioner was a *bona fide* resident of the county where it was filed, and sets forth as causes for a divorce abandonment from December, 1854, and cruel treatment, by the husband. His answer denied the allegations of the petition. His cross-petition prayed for a divorce, for the custody of the children, and for provision for their support out of the separate property of the wife described in the deed

of settlement. The decree sets forth as follows: "The court find the marriage, abandonment and residence of the said Annie J. Cheever, and the births and names and ages of the children, as alleged in the original petition, to be true, and the residue of said petition to be untrue." A divorce was thereupon adjudged in the usual form.

It would be a sufficient answer to the questions raised as to the validity of this decree that no such issue is made in the pleadings. The answer of Mrs. Worcester is silent upon the subject. Wilson, in his answer, says he "does not admit the validity or regularity of said decree," or that "it is operative to affect his rights," but, on the contrary, . . . "reserves to himself the right to impeach it if occasion should offer and require him to do so." This language is too vague and indefinite to have any effect. If he desired to assail the decree he should have stated clearly the grounds of objection upon which he proposed to rely. The averments should have been such that issue could be taken upon them. *White v. Hall*, 12 Ves., 324. He and his co-defendant are precluded by the settled rules of equity jurisprudence from entering upon such an inquiry. Their silence is an admission, and they are bound by the implication. As, however, the question has been fully argued upon both sides, and may arise hereafter in further litigation between the parties, we deem it proper to express our views upon the subject.

§ 588. *A decree of divorce, valid and effectual in the state where it was rendered, is valid and effectual in all the other states.*

The petition laid the proper foundation for the subsequent proceedings. It warranted the exercise of the authority which was invoked. It contained all the requisite averments. The court was the proper one before which to bring the case. It had jurisdiction of the parties and the subject-matter. The decree was valid and effectual, according to the law and adjudications in Indiana. Statute of 1852, § 33; *McQuigg v. McQuigg*, 13 Ind., 294; *Noel v. Ewing*, 9 id., 52; *Lewis v. Lewis*, id., 105; *Rourke v. Rourke*, 8 id., 430; *Tolen v. Tolen*, 2 Blackf., 407; *Wilcox v. Wilcox*, 10 id., 436. The constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana. Const., art. 4, § 1; 1 Stat. at Large, 122; *D'Arcy v. Ketchum*, 11 How., 175. "If a judgment is conclusive in a state where it is rendered, it is equally conclusive everywhere" in the courts of the United States. 2 Story on Const., § 1313; *Christmas v. Russell*, 5 Wall., 302.

It is said the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence and of the change of domicile. *Case v. Clarke*, 5 Mason, 70 (COURTS, § 1048); *Cooper v. Galbraith*, 3 Wash., 550; *McDonald v. Smalley*, 1 Pet., 620 (COURTS, §§ 1219-20). That she did reside in the county where the petition was filed is expressly found by the decree. Whether this finding is conclusive, or only *prima facie* sufficient, is a point on which the authorities are not in harmony. *Noyes v. Butler*, 6 Barb., 613; *Hall v. Williams*, 6 Pick., 239; *Mills v. Duryee*, 2 Am. Lead. Cases, 791, note. We do not deem it necessary to express any opinion upon the point. The finding is clearly sufficient until overcome by adverse testimony. None adequate to that result is found in the record. Giving to what there is the fullest effect it only raises a suspicion that the *animus manendi* may have been wanting.

§ 589. *A wife may acquire a domicile separate from her husband for purposes of divorce.*

It is insisted that Cheever never resided in Indiana; that the domicile of the

husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues. 2 Bishop on Marriage and Divorce, 475. The proceeding for a divorce may be instituted where the wife has her domicile. The place of the marriage, of the offense, and the domicile of the husband are of no consequence. *Ditson v. Ditson*, 4 R. I., 87.

The statute of Indiana enacted that "the court, in decreeing a divorce, shall make provision for the guardianship, custody, and support, and education of the minor children of such marriage." Act 1852, § 21. That part of the decree which relates to this subject has been already sufficiently considered. *Barber v. Barber*, 21 How., 582 (COURTS, §§ 903-12), has an important bearing upon the case under consideration. There a wife had obtained a divorce *a mensa et thoro*, and an allowance of alimony, in the state of New York. The husband afterwards removed to Wisconsin. To enforce the payment of the alimony she sued him in equity in the district court of the United States for that district. The court was clothed with equity powers. The ground of federal jurisdiction relied upon was the domicile of the husband and wife in different states. The court decreed for the complainant. This court, on appeal, recognized the validity of the original decree, sustained the jurisdiction and affirmed the decree of the court below. This is conclusive upon several of the most important points involved in the case before us.

Decree reversed, and the case remanded with directions to enter a decree in conformity to this opinion.

§ 590. Separation.—For goods delivered to the wife on her credit, after a separation and the husband's settlement of a separate maintenance upon her, the husband is not liable. But if the husband, after delivery of the goods, expressly promised to pay for them, and it does not appear that credit was originally given to the wife instead, a jury may infer that the goods were delivered by his order and hence that the husband is liable. *Shreve v. Dulany*, 1 Cr. C. C., 499. See as to injury of wife's property where husband and wife live apart, § 146.

§ 591. A married woman, being liable to be sued in California for debts contracted while living apart from her husband, may be adjudged a bankrupt. *In re Lyons*, 2 Saw., 524.

§ 592. Divorce.—A husband cannot maintain a divorce suit solely because his wife denies matrimonial intercourse. *Steele v. Steele*,* 1 MacArth., 505.

§ 593. United States courts have not general jurisdiction in cases of divorce and alimony. *Barber v. Barber*, 21 How., 582 (COURTS, §§ 903-12).

§ 594. Divorce will not be granted on the ground of alleged insanity previous to marriage, where the parties lived long together and brought up a family of children; nor for violent language and irritable temper; nor, where the parties agreed to live separate, on the ground of abandonment. *Secor v. Secor*,* 1 MacArth., 680.

§ 595. It is not cause for divorce that the wife was mother of a bastard born previous to the marriage, especially where the husband was so informed before he married her. *Farr v. Farr*,* 2 MacArth., 85.

§ 596. Jurisdiction in divorce cases considered by virtue both of common law and the territorial act. *Cast v. Cast*,* 1 Utah T'y, 112.

§ 597. Oregon code gives to the prevailing party "in all cases" of divorce one-third of all lands owned by the other. This is a right which results wholly from the entry of a decree of divorce aside from any express provision in it to that effect; the right, however, is limited to cases in which the decree is given under such code of procedure and by a court of that state. *Barrett v. Failing*,* 6 Saw., 478. And see *Fitch v. Cornell*, 1 Saw., 156.

§ 598. Divorce law of Washington Territory considered, as to divorce practice and the allowance of alimony. Trial by jury cannot be demanded under the law of this territory. *Madison v. Madison*,* 1 Wash. T'y, 73. And see *Thorndike v. Thorndike*,* 1 Wash. T'y, 198.

§ 599. A decree for divorce *a vinculo*, and declaring that the articles entered into previously for alimony shall remain in force, is no bar to an action upon a bond given to perform those articles. *McGowan v. Caldwell*, 1 Cr. C. C., 481.

§ 600. Wife must contest divorce suit before she will be allowed alimony. *Allen v. Allen*, Hemp., 58.

§ 601. A decree for alimony is a debt of record and may be sued on like any other judgment. *Barber v. Barber*, 21 How., 582 (COVERS, §§ 908-12).

§ 602. A wife divorced *a mensa et thoro* may acquire domicile and citizenship different from her husband so as to sue in United States court for the alimony adjudged by the court decreeing the divorce. (DANIEL, J., dissents.) *Ibid.*

§ 603. Where a statute authorizes the court, in granting divorces, to make such order "for the maintenance and education of the children of the marriage as may be just," the custody of the children may be awarded to either parent, and the order of the court cannot be questioned collaterally. *Bennett v. Bennett*, Deady, 299.

§ 604. That the impediment of divorce is a penalty upon the guilty party operative only within the state, and operates no bar to a remarriage outside of it, see *Ponsford v. Johnson*, 2 Blatch., 51 (§§ 10-12). And see as to bigamy, § 89.

§ 605. In Indiana a conveyance of real estate to husband and wife creates an estate in joint tenancy. Such estate, while it exists, gives neither husband nor wife an interest available upon the bankruptcy of either. The effect of a divorce, procured subsequent to an adjudication in bankruptcy against the husband, is not, at all events, to give the husband's assignee an available interest, but rather to vest in the bankrupt a new acquisition. *In re Benson*,* 16 N. B. R., 877.

§ 606. A decree of divorce which is partial, not dissolving the marriage relation, does not restore to the husband rights to property which he may have voluntarily settled upon his wife. *Jackson v. Jackson*, 1 Otto, 122 (§§ 862-64).

II. PARENT AND CHILD.

SUMMARY—*Legitimacy and its proof*, §§ 607-613.—*Adopted child*, § 614.—*Parental right of custody*, § 615.

§ 607. It is not competent in questions of pedigree to give in evidence the declarations of a deceased person, only connected with the family by marriage. *Blackburn v. Crawfords*, §§ 616-22.

§ 608. The church record of baptism is only admissible to prove the fact and date of the baptism, not the legitimacy of the child. *Ibid.*

§ 609. The record of a suit on the issue of one child's legitimacy cannot estop the children who were not parties. *Ibid.*

§ 610. The law of Louisiana stated, on the subject of illegitimacy, as to succession by will or inheritance. *Gaines v. Hennen*, §§ 628-37.

§ 611. In Louisiana, where a marriage is made in good faith, one or both of the parties believing that no impediment exists, the issue thereof is to a certain extent legitimate, though the marriage itself be void. *Ibid.*

§ 612. Testamentary recognition of the legitimacy of a child is of the highest legal authority. *Ibid.*

§ 613. In Louisiana the denial to a daughter of the rights of "forced heir" of her father does not debar her from claiming as legitimate child and universal legatee under his will. *Ibid.*

§ 614. Massachusetts act of 1876, relative to the adoption of children, stated; and *held*, that a child adopted by A. under this act was a "child" in such a sense as to take under a devise by the will of A.'s own father, which gave to A. income for life and upon his decease the capital share or portion to A.'s "child or children then living." *Tirrell v. Bacon*, §§ 638, 639.

§ 615. A father is not, as matter of course, entitled to the custody of his minor child, regardless of the child's best interest. *United States v. Green*, §§ 640-42. See INFANCY, *post*.

[NOTES.—See §§ 648-697.]

BLACKBURN v. CRAWFORDS.

(3 Wallace, 175-196. 1865.)

STATEMENT OF FACTS.—Dr. Crawford died in Maryland, intestate, in December, 1859, leaving neither wife nor child, nor brother nor sister. His nearest relatives were a nephew and three nieces, children of his deceased

brother, Thomas B. Crawford. The legitimacy of these persons was the question involved in this case; if legitimate, they were the heirs at law of the intestate, otherwise, relatives by the name of Blackburn, his cousins, were his heirs.

Elizabeth Taylor, the mother of the Crawford claimants, had been for many years either the mistress or the wife of Thomas B. Crawford. The Crawford claimants attempted to prove that, although the intercourse had been irregular in its origin, a marriage was solemnized between their parents many years before the death of Dr. Crawford; in fact, before the birth of two of the children, and four years and a half before the death of their father. There were no living witnesses of the alleged marriage ceremony except the priest who, it was said, solemnized it. His deposition was taken, and the attorney who drew the will of Thomas B. Crawford testified as to the testator's declarations at the time of making his will, in which he expressly described his children as *natural* children.

There was a judgment in favor of the Crawford claimants in the circuit court for Maryland, and a writ of error was brought to this court.

Various matters stated in evidence at the trial appear sufficiently in the opinion. As to the instructions given by the court at the trial the plaintiff asked the following, which the court gave, no opposition being made:

"1st. That if the jury find, from the evidence of Elizabeth Crawford, that she was married at St. Patrick's church, in the city of Washington, by the Reverend Timoleon Fiziak, then the assistant minister of said church, on the 1st of September, 1835, to Mr. T. B. Crawford; and shall further find, from the evidence, that two of the lessors of the plaintiff were children of the said T. B. Crawford and the witness, born prior to the marriage, and subsequently to the marriage were recognized and treated by said T. B. Crawford as his children; that the other two lessors of the plaintiff were children of T. B. Crawford and Elizabeth Crawford, were born subsequently to said marriage,—then the verdict must be for the plaintiff.

"3d. That a marriage, celebrated as deposed to by the said Elizabeth Crawford, if the jury shall find that it was so celebrated, would not be invalidated because no marriage license had been obtained."

The defendant asked these instructions, which were refused:

"1. That it will be competent for the jury, on all the evidence, to find that the cohabitation between Mr. Crawford and Elizabeth Taylor, during the entire period of such cohabitation, was illicit, and that no marriage was ever solemnized between them; and if they so find, their verdict ought to be for the defendant.

"2. That it is competent for them, on all the evidence, to find that no marriage was ever celebrated between the said Crawford and Elizabeth Taylor; and, unless they find that a marriage was in fact celebrated between them, their verdict ought to be for the defendant."

Finally the court charged, in substance, as follows:

"1. If the jury find that T. B. Crawford and Elizabeth Taylor were married *at any time*, and that two of the lessors of the plaintiff were born subsequent to the said marriage, and two of them were born before it, and that those two so born before marriage were, subsequently to its date, acknowledged and recognized by Mr. Crawford as his children, then their verdict must be for the plaintiff.

"2. The jury may find the marriage from the testimony of Mrs. Crawford,

if they believe her, or from the acts and declarations of Mr. Crawford, taken in connection with all the other evidence in this case; and such marriage, to be valid in this state, requires only the consent of the parties, and would be valid, although the jury may find that it was not solemnized before any minister of the gospel.

"3. And if the jury shall find that *at any time* Mr. Crawford and Elizabeth Taylor lived together as man and wife; that he acknowledged that she was his wife, and always treated her as such; and the children which she bore during that time as his children, and permitted them to be called by his name, then the presumption of law is in favor of the legitimacy of said children. But if the jury shall find, from all the evidences in the case, that no marriage ever took place between the parties, then that their verdict should be for the defendant."

Opinion by MR. JUSTICE SWAYNE.

We will consider the exceptions, so far as we deem necessary, both as respects the testimony and the instructions, in the order in which they are presented by the record.

§ 616. *It is not competent in questions of pedigree to give in evidence the declarations of a deceased marriage connection.*

The *first* exception relates to the admission of evidence as to what Sarah Evans had said in regard to the marriage of her sister, Elizabeth Taylor, with Mr. Crawford. Was the testimony rightly admitted?

Greenleaf says (Evidence, vol. I, § 103): "It is now settled that the law resorts to hearsay evidence in cases of pedigree, upon the ground of the interest of the declarants in the person *from whom the descent is made out*, and their consequent interest in knowing the connections of the family. The rule of admission is therefore restricted to the declarations of deceased persons who were related by blood or marriage to the person, and therefore interested in the succession in question."

It is well settled that before the declarations can be admitted, the relationship of the declarant to the family must be established by other testimony. 1 Taylor on Ev., § 576.

Here the question related to the family of Dr. Crawford. The defendants in error claimed to belong to the family, and to be his nephew and nieces. To prove this relationship it was competent for them to give in evidence the declarations of any deceased member of that family. But the declarations of a person belonging to another family, such person claiming to be connected with that family only by the intermarriage of a member of each family, rests upon a different principle. A declaration from such a source of the marriage which constitutes the affinity of the declarant, is not such evidence *aliunde* as the law requires.

It is insisted by the defendants in error, upon the authority of *Moncton v. The Attorney-General*, 2 Russ. & M., 156, that it was sufficient to show the relationship of the declarant to Elizabeth Taylor. As we understand that case, it has no application to the point under consideration. None of the writers on the law of evidence have given it so wide a scope. Hubback on Succession, 660, thus states the principle which it decides: "It is sufficient that the declarant be connected by extrinsic evidence with one branch of the family, touching which his declaration is tendered." Lord Brougham himself said in that case: "I entirely agree that, in order to admit hearsay evidence in pedigree, you must, by evidence *dehors* the declarations, connect the persons

making them with the family. To say that you cannot prove the declarations of A., who is proved to be *a relation by blood of B.*, touching the relationship of B. with C., unless you have first connected him with C., is a proposition which has no warrant, either in the principle upon which hearsay is let in, or in the decided cases." If it had been proved by independent testimony that Sarah Evans was related by blood to any branch of the family of David Crawford, and her declarations had been offered to prove the relationship of another person claiming, or claimed, to belong also to that family, this case would be in point. But the declaration of Sarah Evans, offered to prove that her sister was connected by marriage with a member of that family, was neither within the principle nor the language of that authority.

In *Edwards v. Harvey*, Coop., 38, an issue out of chancery was directed, to try the question whether "A. B., from whom the plaintiff claimed, was not proved to be related to C. D., who was the granting party in the conveyance to the plaintiff." A new trial was moved for on the ground that the court had rejected a paper offered in evidence by the plaintiff. "It was a pedigree drawn out by Bridget Lloyd, a maiden lady, deceased, showing that C. D., who was her relative, was related to A. B." The master of the rolls "refused a new trial, because if Miss Bridget Lloyd's pedigree, written by herself, were evidence for her relation, so would her declaration have been, to show that she was herself entitled to the estate." In *Doe v. Fuller*, 2 Moore & P., 24, Chief Justice Best said: "If there were no other evidence than the declarations of *John* to show that James was a member of the family, they could not have been received, as that would be carrying the rule as to the admissibility of hearsay evidence further than has ever yet been done, viz., *to allow a party to claim an alliance with a family by the bare assertion of it.*" We think the court erred in admitting the testimony.

§ 617. *The church record of a baptism is only admissible to prove the fact and date of the baptism, not the legitimacy of the child.*

The next question is as to the entry in the baptismal register of St. Patrick's church. The plaintiff in error objected to it as inadmissible for any purpose. If admitted, he contended that it was competent to prove but the fact and date of the baptism. The court overruled both objections, and admitted the entry as evidence, as well of the fact and date of the baptism as of the fact that the child was baptized "as the lawful child of Thomas B. Crawford and Elizabeth Taylor, his wife."

The register was admissible upon the ground that the entries in it were made by the writer in the ordinary course of his business. *How far* such an entry is evidence is a different question. Upon that subject, Starkie on Evidence, 612 (2d Lond. ed.), thus lays down the rule: "An entry of the time of a child's birth, although contained in a public register, is not evidence as to *the time of the birth*, unless it can be proved that the entry was made by direction of the father or mother; and this seems to be received as a declaration made by one of them — for a clergyman has no authority to make an entry as to the time of the birth, and possesses no means for making any inquiries as to the fact." Greenleaf (Evidence, § 493) says: "It is to be remembered that they are not generally evidence of any fact not required to be recorded in them, and which did not occur in the presence of the registering officer. Thus a parish register is evidence only of the time of the marriage and of its celebration *de facto*, for these are the only facts necessarily within the knowledge of the party making the entry."

Without further evidence, the court ought not to have admitted the entry in question for any purpose but to prove the baptism of the child and the date of the administration of the rite. We think this proposition too clear to require discussion.

§ 618. *The record of a suit on the issue of one child's legitimacy cannot estop the children who were not parties.*

The third matter is as to the transcript of the record in the orphans' court of Prince George's county, Maryland. It was proposed by the plaintiff in error to read from it the finding of the jury which, upon one issue, directed that, namely, whether Mr. Crawford ever lawfully married Elizabeth Taylor, either before or after the birth of George Thomas Crawford, was in the negative; and also to read the order of the court made thereupon. (a) The court below rejected the evidence.

Such a result, under the laws of Maryland, to which our attention has been called, has all the elements of *res judicata*. The transcript was competent evidence against George Thomas Crawford. As to him it was an estoppel, and barred his right of action. But it did not affect the other defendants in error who were not parties to the proceeding. If they proved a marriage, as alleged, they were entitled to recover the entire property. This they might have done, although the demise was laid in the declaration as made jointly by all the parties. By a statute of Maryland, a joint demise is made several as well as joint, and a recovery may be had accordingly by one or more of the lessors. In this case it was immaterial to the plaintiff in error who recovered. A verdict in favor of one or all was alike fatal to his claim to the property in controversy. The error of the court, therefore, did him no injury.

§ 619. *Competency of the memorandum of a priest in which he enters marriages as they occur.*

We come, in the fourth place, to consider the matter of the testimony of the Reverend Mr. Fiziac, examined in France on a commission, and whose deposition was offered by the plaintiff in error, and in a large part excluded by the court. The witness is not very explicit as to the "private memorandum" which he testifies that he kept. We understand, from what is said, that it was a book or paper, in which he entered, or intended to enter, each marriage as it occurred. Such entries, being made by the writer in the ordinary course of his business, are competent evidence.

If offered to prove a marriage, the production of the memorandum would have been necessary for two reasons: it would have been the best evidence of the existence and contents of the entry, and would have given to the adverse party the means, to which he was entitled, of a cross-examination. Here it was proposed to use the testimony negatively. The object was to draw the inference that the marriage had not occurred, from the fact that no entry of it was found to exist. We think the same considerations apply as if the purpose had been to prove a marriage affirmatively.

§ 620. *An objection to a deposition taken abroad should be made before the trial.*

While the memorandum was within the reach of the party, proof that it did or did not contain a particular entry could not be received without producing the memorandum itself. In the absence of proof of a further effort to procure the original — or failing that, of an effort to procure an examined copy, — this

(a) Upon an application for administration to the probate court, the jury had found illegitimacy. But only one of the children concerned was party to that proceeding.

objection, taken at the proper time, would perhaps have been sufficient to exclude the testimony. If it had been notified in season to the plaintiff in error that the objection was to be made, he might have obviated the difficulty. The deposition was taken in France, under a commission, upon interrogatories by both parties. The objection could not, therefore, be made before the taking officer. It should have been presented before the trial by a motion to suppress. At the trial it came too late. It was then to be considered as finally waived. *York Co. v. Central Railroad*, 3 Wall., 107. The court therefore erred in rejecting the testimony.

In regard to the other exception relating to this deposition we entertain no doubt. The cross-interrogatories were not very respectful to the witness. His answers were natural and proper, and should have gone to the jury.

§ 621. *Declarations of a testator to an attorney, in making his will, how far privileged communications.*

The fifth point raised relates to Mr. Bowie. Was the testimony of this gentleman—the attorney who drew the will of Mr. Crawford, and by whom the plaintiff in error offered to prove what was said by the testator in their interviews preceding the preparation of the will, and, in that connection, concerning the illegitimacy of the children and his relation to their mother—rightly excluded? It is asserted that the communications upon these subjects to the attorney were covered by the seal of professional confidence, and that he could not, therefore, be permitted to disclose them.

The principle of privileged communications was ably considered by Lord Brougham in *Greenough v. Gaskel*, 1 Mylne & K., 98. He said: “The foundation of the rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of courts, and in those matters affecting the rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsel half his case.”

In *Russel v. Jackson*, 15 Jurist, 1, 117, the contest was between the heirs-at-law and a devisee. The heirs claimed that the devise was upon a trust, unexpressed, because illegal. The question was, whether the solicitor by whom the will was drawn should be allowed to testify what was said by the testator contemporaneously upon the subject? The devisee claimed the benefit of the rule. The vice-chancellor said: “When we pass from cases of conflict between the rights of a client and parties claiming under him—and those of third persons—to cases of a testamentary disposition of a client, do the same reasons apply? The disclosure in such cases can affect no right or interest of the client; and the apprehension of it can present no impediment to a full statement to the solicitor, unless he were contemplating an illegal disposition—a case to which I shall presently refer; and the disclosure, when made, would expose the court to no greater difficulty than it has in all cases when the views and intentions of parties, or the objects for which the disposition is made, are

unknown. In the case, then, of a testamentary disposition, the very foundations on which the rule proceeds seem to be wanting; and, in the absence of any illegal purpose entertained by the testator, there does not seem to be any ground for applying the rule in such a case. Can it be said, then, that the communication is protected because it may lead to the disclosure of an illegal purpose? I think not; and that evidence, otherwise admissible, cannot be rejected upon such grounds. Another view of the case is, that the protection which the rule gives is the protection of the client; and it cannot be said to be for the protection of the client that evidence should be rejected — the effect of which would be to prove a trust created by him, and to destroy a claim to take beneficially by the parties accepting the trust."

This reasoning applies to the declarations of the testator here in question. How can it be said to be for his interest to exclude any testimony in support of what he solemnly proclaimed and put on record by his will? Especially can this be said in regard to property to which he never had or assumed to have any title, and in regard to a claim by others to that property, which he did all in his power, by his will, to foreclose?

But there is another ground upon which we prefer to place our decision. The client may waive the protection of the rule. The waiver may be express or implied. We think it as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its object, and in direct conflict with the reasons upon which it is founded.

§ 622. *Comments upon the instructions given by the court at the trial.*

Finally, as to the instructions to the jury asked and refused, and as to those given. The first and third instructions offered by the defendants in error were properly given. The two instructions submitted by the plaintiffs in error were unexceptionable, and should also have been given. The three instructions given by the court *sua sponte*, were characterized by a common error. They submitted to the jury, as a question to be considered, whether there was not a marriage at a different time and place, and contracted in a different manner from that alleged by the putative wife, Elizabeth Taylor. Her testimony was clear and positive. It was wholly inconsistent with such a proposition. If there were none as alleged by her, clearly there was none at any time. This was the hinge upon which turned the controversy. All the testimony clustered about and related to that inquiry. The jury should have been so instructed, and their deliberations confined accordingly. Lord Hale says, they should be told "where the main question or the knot of the business lies." History of the Common Law, 256. The further inquiry did not arise in the case. What was said could hardly fail to mislead and confuse. It permitted them to substitute conjecture for deduction, and opened a field beyond the sphere of the case, where the means of error were abundant.

The third of these charges is liable to a further objection. It instructed the jury that, if the facts were as there stated, "the presumption of law was in favor of the legitimacy of the children." Under such circumstances the law makes no presumption. The question to be determined was one of fact and not of law. The facts referred to were a part of the evidence. They were to be weighed against the countervailing evidence. They might, by

possibility, all be true, and yet no marriage have occurred and the children all be illegitimate. In our view of the case the question of a marriage *per verba de presenti* did not arise. We have, therefore, not considered that subject.

Judgment reversed, with costs, and the case remanded to the circuit court, with an order to issue, *a venire de novo*.

MR. JUSTICE CLIFFORD dissented: 1. On the ruling as to the admissibility of the church record. 2. As to the testimony of the attorney. 3. Holding that the charge of the circuit court was correct.

GAINES v. HENNEN.

(24 Howard, 558-632. 1860.)

APPEAL from U. S. Circuit Court, Eastern District of Louisiana.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—We will first give some of the facts of this case that the litigation which has grown out of the wills of Daniel Clark may be correctly understood. Without them it could not be.

They have been the subject of five appeals to this court. This is the sixth. It presents the controversy differently from what it has been before. It also presents points for decision which were not raised in either of the preceding cases. Some of those that were, however, will necessarily be mentioned in this opinion to illustrate their connection with this case. They may be so considered without our coming at all into conflict with any judgment heretofore given concerning the rights of the parties in any antecedent appeal. Our conclusion will differ from one of them on account of testimony in this case which was not in that, but they will not be contradictory; and because we have information in this, concerning a piece of testimony then relied upon, which we shall exclude in this, as inadmissible for any purpose.

Four of the five appeals were decided by this court substantially in favor of Mrs. Gaines. The fifth was adverse, not in anywise excluding the re-examination of the only point then ruled by the use of the same testimony, and that which is new. Considered in connection, both have impressed us with a different impression of the *status* of Mrs. Gaines' legitimacy from that which this court did not then think was sufficiently proved, as we now think it has been. Now she is here with a support which her cases have not had before. She comes with a decision of the supreme court of Louisiana, directing, upon her application, that the will of Daniel Clark, dated at New Orleans, July 13, 1813, as set forth in her petition, should be recognized as his last will and testament, and that it should be recorded and executed as such. In that will her father acknowledges that his beloved Myra, then living in the family of Samuel B. Davis, is his legitimate and only daughter, and bequeaths to her all the estate, real and personal, of which he might die possessed, subject only to the payment of certain legacies named in the will.

Her petition for the probate of that will was first addressed to the second district court of New Orleans, in which Judge J. N. Lea presided. After asserting that such a will had been made by her father, its contents were set out as they were recollected by witnesses who had read it, and by other persons to whom it had been shown by the testator, with whom he spoke of it in the last moments of his life, as his last will and testament, in favor of his

legitimate daughter Myra, charging them to take care of it, and telling them it would be found locked up in a trunk, describing it, which he had placed in a certain room in the house.

The will is then stated in the petition to have been olographic; that is, altogether written and signed in her father's handwriting, with his seal attached to the same; that immediately after his death diligent searches were made for it; that it could not then be found; that it has not been since, and that it had been mislaid, lost or destroyed. She then declares that when her father died she was a minor, absent from New Orleans, and living with Samuel B. Davis, to whom and whose lady she had been confided in the year 1812. Judge Lea took cognizance of her petition, proceeded throughout its pendency with great judicial exactness and caution, and, as the whole record shows, with official liberality to every one concerned in resisting the application, without in any particular having denied to the petitioner her rights.

The judge, however, finally decided against the sufficiency of the proof to establish the will according to the requirements of the Civil Code of Louisiana, but without prejudice to the right of the petitioner to renew her application, with such proofs as might be sufficient to establish an olographic will. She applied for a new trial, and upon that being denied, solicited an appeal to the supreme court, and that was allowed.

The supreme court tried the case. It differed with Judge Lea as to the proof which was required by the code to establish a lost or destroyed olographic will. It reversed the judgment of the court below, and decreed that the will of Daniel Clark, dated on the 13th July, 1813, should be recognized as his last will and testament, and ordered it to be recorded and to be executed as such, it being posterior to the will of May, 1811, which Relf and Chew had presented for probate, under which they had taken possession of the property of Daniel Clark, and had disposed of it to the entire exclusion of Mrs. Gaines from any part of it — an estate shown by the proof in the cause introduced by the defendants, which had been registered or inventoried a short time before Clark's death, at more than \$700,000, in which Clark and Coxe were interested, and an estate exclusively belonging to Clark of \$296,000.

§ 623. *Secondary proof of an olographic will under the law of Louisiana, where the will has been lost or destroyed.*

But to return to the decree of the supreme court establishing the will of 1813. It must be understood that its admission of the will to probate does not exclude any one who may desire to contest the will with Mrs. Gaines from doing it in a direct proceeding, or from using any means of defense by way of answer or exception, whenever she shall use the probate as a muniment of title. And the probate does not exclude Relf and Chew, or any other parties having any interest to do so, to oppose the will, when it shall be set up against them, by such defenses as the law will permit in like cases. It was with those qualifications of the probate of the will of 1813 that the case was tried in the court below, and they have been constantly in our minds in the trial of the appeal here.

Upon the rendition of the probate by the supreme court, Mrs. Gaines filed her bill in this case. It shall be fully stated hereafter, with the defenses made against it. Before doing so, it is due to the merits of the controversy to advert to the decisions of the probate court of the second district of New Orleans, and to that of the supreme court reversing it, more minutely than has been

done. Especially, too, as they are coincident with our conclusions upon the testimony regarding the execution by Mr. Clark of his olographic will of 1813, and of the concealment or destruction of it after his death.

The supreme court adopts the prepared statement of the facts of the case as it was made by Judge Lea in the court below. Its accuracy has never been denied by any one of the parties interested in this suit, nor by any one else. It is as follows: "The petitioner alleges that on the 16th of August, 1813, the late Daniel Clark, her father, departed this life, having previously, on the 13th of July, executed an olographic will and testament, by which he recognized her as his legitimate and only daughter, and constituted her universal legatee. That the will was wholly written, dated and signed, in the handwriting of the testator, and was left among his papers at his residence; that after his death search had been made for it, but that it was not found, and that it had been mislaid, lost or destroyed."

The learned judge then proceeds: "To entitle the petitioner to a judgment recognizing the existence and validity of the will, it is necessary that she should establish affirmatively, by such testimony as the law deems requisite, that Daniel Clark did execute a last will containing testamentary dispositions as set forth in the petition, and that he died without having destroyed or revoked it." "That looking for the testimony which might solve the question, whether such a will had ever been executed or not, a reasonable inquirer would naturally turn for information to those who were most intimate with the deceased in the latter part of his life, and especially, if they could be found, to those who were with him in the last moments of his existence, when the hand of death was upon him, if they had no interest in directing his property into any particular channel, as they might be considered as the best and most reliable witnesses that could be produced; *and it appears to be precisely testimony of that character that the petitioner presents in support of her application.*" Judge Lea then says: "Boisfontaine had business relations with the deceased which brought them into frequent intercourse; and that for the two last days of his life, up to the moment of his death, he was with him. That De la Croix and Bellechasse were intimate personal friends of Clark, and were with him shortly before his death. All of these witnesses concur in stating that Clark said he had made a will posterior to that of 1811, and De la Croix says that Clark presented to him in his cabinet a sealed parcel, which he declared to be his last will, and that it would be found in a small black trunk. De la Croix also had sworn, shortly after Relf had presented the will of 1811 for probate, that Clark had made a will posterior to that; that the existence of it was known to several persons, and he applied for an order of the court and obtained it, commanding every notary in New Orleans to report if such a document had not been deposited with one of them. Bellechasse and Mrs. Harper swore that they had read the will. The judge then expresses his conclusion to be, *that the legal presumption of the existence of such a paper had been made out, and that its having been destroyed or revoked by the testator had been satisfactorily rebutted*, and that there was nothing in the record to impeach the credibility of Bellechasse or Mrs. Harper. In these rulings of the district judge the supreme court concurred, and then said, in delivering its opinion, all that they had to do was to inquire whether the will of 1813 had been proved in conformity with the article No. 169 of the old code or 1648 of the new."

Those articles require the testimony of two witnesses when the will shall be presented for probate, who shall declare their recognition of it as having been

written wholly by the testator, that it had been signed and sealed by him, and their declaration that they had often seen him write and sign in his life-time. It was from such a requirement of proof, rejecting secondary testimony altogether, that the district court refused the petition for a probate of the will. Upon such refusal Mrs. Gaines appealed to the supreme court.

That court said: "That the question of the alleged insufficiency of the proof in the case could only be determined by an inquiry whether the article was to be pursued *at all times and in all cases*, or whether they were not merely directions when the will itself was presented for probate, and were inapplicable to restrain the court in certain cases when by reason of the loss or destruction of such an instrument, from taking secondary proof of its contents, as the best which the nature of the case was susceptible."

The court then by a course of reasoning, supported by several cases from the Louisiana reports, determined that in the event of a will having been destroyed, secondary proof is admissible in Louisiana to prove its contents and to carry it to probate; that the articles 169 and 1648 contemplate that the will itself should be presented with the proofs of its execution to the judge of probate, *when that can be done*; that no one would seriously contend that the calamity of its destruction should deprive the legatee of the right to establish it by secondary evidence; "for was such the law a reward would be offered to villainy, and it would always be in the power of an unscrupulous heir to prevent the execution of a will." It then meets the assertion directly that articles 1648 and 1649 of the code *require the production of the will in order that it might be identified by witnesses who recognize it; denies that position*, and affirms that in the absence of such witnesses the evidence concerning an unproduced, destroyed olographic will might be complete. The articles are not negative laws, declaring that no other kind of proof shall be admitted. "And it is doubted very much if an olographic will made here had by some accident been destroyed before being legally proved, whether a copy of it, identified by two witnesses, who were able to swear to the genuineness of the original in the manner pointed out by law, would not be considered a sufficient compliance with the provisions of the code." Such, in fact, was the petitioner's case they were considering. Such is the law in analogous cases. The law cannot have been intended to require an impossibility, and to leave a party so circumstanced without a remedy.

§ 624. *Doctrine of common law as to the proof of a lost will.*

The doctrine of the common law is in accordance with the view taken by the supreme court of Louisiana concerning lost deeds and wills. It has been judicially acted upon in English and American cases. It was so in the case of *Dove v. Brown*, 4 Carver, 469. That was a suit upon a lost will devising real estate. By the statute of New York it was necessary to prove the will by three credible witnesses. The will of Brown, as to its execution was proved by one of the subscribing witnesses. He stated it was executed in the presence of himself, James Mallory, and another person whose name he did not remember, but that he had no doubt of his being a credible witness. That, the court said, was all the evidence which could be expected under the circumstances. There are several other cases to the same effect in our American reports. Jarman, on the Probate of Wills, 1 vol., Perkins' edition, p. 223, says, upon the authority of many cases, note 4: "That if a will duly executed and not revoked is lost, destroyed or mislaid either in the life-time of the testator, without his knowledge, or after his death, it may be admitted to probate upon satis-

factory proof being given of its having been so lost, destroyed or mislaid, and also its contents." But to entitle a party to give parol evidence of a will alleged to be destroyed, where there is not conclusive evidence of its absolute destruction, the party must show that he has made diligent search and inquiry after the will in those places where it would most probably be found if in existence. Under its reasoning the supreme court of Louisiana, sustained by the authorities in England and in the United States, admitted the olographic will of 1813 of Daniel Clark to probate, declaring also such was the law in Louisiana, and reversed the judgment of the lower court dismissing the petition of Mrs. Gaines.

In virtue of that decision of the supreme court Mrs. Gaines presents herself to this court, declared by her father to be his legitimate and only daughter, and universal legatee. *We will in another part of this opinion show the legal effect of her father's testamentary declaration.*

FURTHER STATEMENT OF FACTS.— We will now state, as briefly as it may be done in such a case, the essential allegations of the bill; the responses of the defendants and their averments; the proofs in support of the complainant's rights, and such of them as are relied upon to defeat them; the legal issues made by the bill and answers, and the points relied upon by both parties in their arguments in this case.

The bill was brought against several defendants, Duncan N. Hennen being one of them. They separated in their answers. Hennen, after giving the claim of title to the property for which he is sued, admits that it was a part of the estate of Daniel Clark, and adopts the answers filed by the other defendants as a part of his defense. The cause was tried with respect to him only, and the bill was dismissed by the court below. From that decree Mrs. Gaines appealed to this court.

After specific declarations as to the character in which she sues and her legal right to do so as the legitimate child of her father and his universal legatee, she acknowledges that he had made a provisional will in the year 1811. That he then made his mother, Mary Clark, his universal legatee, and named Richard Relf and Beverly Chew his executors. That they had presented it to the court for probate; that it had been allowed, and that they, as executors, had taken possession of the entire separate estate of Daniel Clark, and of all such as he claimed in his life in copartnership with Daniel W. Coxe. It is then assumed that the will of 1811 had been revoked by the will of the 13th July, 1813. That Chew was dead; that all the legal power which the probate of the will of 1811 had given to Relf and Chew had expired; that Mary Clark was dead, and that her heirs and legatees reside beyond the jurisdiction of the court.

Mrs. Gaines then states, in the language of equity pleading, the pretenses of the defendants in opposition to her claims. Such as that Relf and Chew sold them the property as testamentary executors of Daniel Clark under the will of 1811; that they bought for a full consideration, without any notice of the revocation of the will of 1811, or that any other person was interested in the property than Mary Clark; that the titles they had from Relf and Chew could not be invalidated by the revocation of that will, and that the right of action against them for the property in their possession, if complainant had ever had any, was barred by prescription—that is, by the acts of limitation of Louisiana. It is then charged by the complainant that Relf and Chew had no authority to sell the property of Daniel Clark when the sales were

made by them. That they had never made an inventory of the decedent's property for the probate court before the sales were made; that the sales were made without any legal notice and for an inadequate consideration. That if Relf and Chew had sold under a power of attorney from Mary Clark, and not as executors, that Mary Clark's power was insufficient in its terms for such purpose; that she had no power or rights in the estate of Daniel Clark to give such a power, and that Relf and Chew had not caused themselves to be recognized in a proper court as Mary Clark's attorneys, as they ought to have done, before they could acquire any right to sell any part of the estate of Clark. She then charges that the defendants knew, when they bought the property sued for, that she had applied as early as in the year 1834 to have her father's olographic will of 1813 probated by the proper court at New Orleans; that the defendants knew of all the irregular proceedings and assumptions of Chew and Relf in respect to the estate of her father, and of their sales of it without authority; that the defendants knew, when they bought, of the suits which she had brought to recover her rights in her father's estate; and that her present suit was brought under the probate of the will of 1813 by the supreme court of Louisiana.

Hennen, the defendant, answers for himself, and, adopting the answers of the other defendants, states that the property for which he was sued is designated according to a plan made in 1844, as lots 9, 10, 11, on the square comprised between Phillippi, Circus and Poydras streets; each lot, by English measure, containing twenty-three feet eleven inches and two lines between parallel lines.

The answers of the other defendants make the same admissions as to their titles having been derived from or through Relf and Chew and Mary Clark; admit the property separately claimed by them to have been a part of the estate of Clark; and finally make an averment that Mrs. Gaines had not that civil *status* by her birth which, under the law of Louisiana, can entitle her to take the property of her father under the will of 1813, though it had been admitted to probate, and that she had been declared in it his legitimate and only daughter. In other words, the defendants have declared that she is an adulterous bastard.

It is proper to state the books and documents which are in evidence in this case: 1. The present record of *Gaines v. Hennen*. 2. The printed record of the suit No. 188, of December term, 1851, in this court, *Gaines v. Relf and Chew*, 12 How., 472. 3. The proceedings in the courts of probate entitled Probate Record. 4. The commercial account-books kept by Relf and Chew, professing to relate to their transactions concerning the estate of Daniel Clark.

This testimony, as it has been enumerated, was brought into the case by agreement of the parties for as much as it might be worth, subject to exceptions by both sides as to its admissibility upon the trial of the cause.

§ 625. *In a suit by a "universal legatee" in Louisiana to recover property of the testator, it is not necessary that the executors or beneficiary of a preceding will be made parties.*

Several immaterial or formal points were made in the argument to defeat the claims set out in this bill. Such as that the case was not one for equity jurisdiction, but was, *ratione materiæ*, exclusively cognizable before the probate court of the second district of New Orleans. Next that Chew and Relf, and Mary Clark, or her heirs, should have been made parties; that the sources

of Daniel Clark's title to the property sued for had not been set out in the bill in addition to the manner it had been enumerated. Again, that the probate proceedings in the second district court of New Orleans in 1856 are yet pending and undetermined, and on that account that the same court has exclusive jurisdiction over the estate of Daniel Clark. We have examined these formal objections, and find them to be unsustainable by the cases cited in support of them. They are inapplicable to the actual state of the case, and are insufficient to arrest the trial of it upon its merits. The same objections were also urged in the circuit court, but were disregarded, we presume, by the judge, as unsubstantial points of defense. As to the objection that Relf and Chew, and the heirs of Mary Clark, had not been made parties to the bill, we observe it was not necessary to make either of them so. The present is a suit for the recovery of property admitted by the defendants to have been a part of the estate of Daniel Clark. Nothing is sought to be recovered from Chew and Relf. Their executorial functions under the will of 1811 have long since been at an end. Had the bill involved directly their transactions as executors with the complainant, as universal legatee, upon a proper showing of that, with a prayer to be made parties, the court might have allowed it. But not having done that, the defendants cannot urge, because Relf and Chew have not been made defendants with them, that they should escape from a trial on the rightfulness of their possession of a part of the estate of Clark, as they have admitted it to be; or that they had not acquired it under circumstances from which the law presumes that they had notice of the irregularity of the sale as it was made by Relf and Chew. Nor was it necessary for the heirs of Mary Clark to be made parties; for Mary Clark herself never had any pecuniary responsibilities for the sales of the property of the estate of her son by Relf and Chew, as her power of attorney to them upon its face was irregularly executed, and was of itself notice to the defendants that when they bought, the sales had not been made in conformity with the law of Louisiana regulating the sales of the property of a testamentary decedent.

§ 626. *Conclusiveness of the decree of the state court establishing the probate of a will.*

But it was also said in the argument that no claim could be set up by Mrs. Gaines under the will of 1813, until the will of 1811 shall be set aside. Neither the language used by this court in 2 Howard, 651, nor in the decision in 12 Howard, will bear such an interpretation, or admit of such a conclusion. The rulings of courts must be considered always in reference to the subject-matter of litigation and the attitude of parties in relation to the point under discussion. And it will often be the case, as it is now, that counsel will use an illustration for a judicial ruling, or words correctly used when they were written as applicable to a different state of things. When this court said, in 12 Howard, 651, that the will of 1813 cannot be set up without the destruction of the will of 1811, it was with reference to the existing fact that the latter had been duly proved, and that it stood as a title to the succession of the estate of Daniel Clark, and that the will of 1813 had not then been proved before a court of probate, and on that account could not be set up in chancery as an inconsistent and opposing succession to the estate while the probate of the will of 1811 was standing in full force. And when Mr. Justice McLean, speaking for the court, 2 Howard, 647, says, "she (meaning Mrs. Gaines, then the complainant) must ask for the probate of the will of 1813, and a revocation of the other will of 1811," adding "for no probate can stand while a previous one is unrevoked,"

it is plain that the meaning was, as we now say it is, when a court recalls the probate of a will, substituting the probate of another will by the same testator made posterior to the first, that the former becomes inoperative, and the second is that under which the estate is to be administered, without any formal declaration by the court that the first was annulled, and it makes no difference that a part of the estate has been administered under the first probate. The unadministered must be done under the second. Courts of probate may for cause recall or annul testamentary letters, but they can neither destroy nor revoke wills; though they may and often have declared that a posterior will of a testator shall be recognized in the place of a prior will which had been proved, when it was not known to the court that the testator had revoked it. Such is exactly this case. The supreme court decreed that the will of Daniel Clark, dated New Orleans, July 13, 1813, as set forth in the plaintiff's petition, should be recognized as his last will and testament, and the same was ordered to be recorded and executed as such, *with the declaration* that admitting the will to probate does not conclude any one who may desire to contest the will with the applicant in a direct action. The decree of the court in that particular is the law of the case.

It was also urged that the defendant and those under whom he claims were purchasers for a valuable consideration without notice, and are therefore in equity protected against the claims of the complainant. It is a good defense when it shall be proved as a matter of fact. But in this instance it is not only disproved by testimony introduced by the defendants, but by admissions in their answers, as shall be shown hereafter in this opinion. In our opinion the objection has no standing in this case, though the argument from which the counsel admitted he had borrowed it is a very good one in its proper place.

§ 627. *Legal interruption of a prescription under the law of Louisiana.*

We shall now examine the case upon the more serious points made in opposition to Mrs. Gaines by the learned counsel, Mr. Janin.

The first was, that her claim was barred by prescription. The prescription relied upon by the defendants is that of ten years against one *claiming a vacant estate*, twenty years to prescribe a title, and thirty years to bar the faculty of accepting a succession or the estate of a deceased person. There being no vacant succession in this case, the ten years' prescription does not apply, and the prescription of twenty years does not exist; for Mrs. Gaines did not attain her majority until June or July, 1826, and her suit for the probate of the will made by her father on the 13th of July, 1813, *was instituted in 1824*. When her petition for that purpose was *dismissed in 1836*, her first bill was filed in a month or two afterwards. From that time there was a legal interruption of the prescription of twenty years, which the defendants have pleaded and now rely upon. In fact, they recognize the interruption in their answers. In their averment of their having had peaceable possession of the property sued for since they bought it, they add, "that they had never been disturbed in respect to it," *except by an abortive attempt of the complainant and her husband to recover it by their bill filed in 1836*. New Record, 47. We find them also in their answer (New Record, 54) admitting that such a suit as complainant refers to in her present bill had been instituted by her and her husband in 1836, and that the object of it *was the recovery of the "identical property" now in controversy*. New Record, 56, 57. It is also admitted in the answer that the suit of the complainant in the probate court to annul the probate of the will of 1811, and to set up that of 1813, was brought *on the 18th June, 1834*.

These admissions are decisive that the complainant claimed the inheritance as early as that date, and that the prescription which had begun to run had been legally interrupted on the 28th July, 1836, the date of her first bill.

By the article of the code, 3484, a legal interruption of a prescription takes place where the possessor has been called to appear before a court of justice, either on account of the property or the possession, and the prescription is interrupted by such demand, whether the suit has been brought before a court of competent jurisdiction or not.

The weight of authority upon the construction of that article of the code is that it contemplates a voluntary, intentional and active abandonment of the suit, in order to restore the running of a right of prescription. In the case of *Wilson v. Marshall*, 10 La. Ann., 331, the court said the plaintiff did not dismiss the suit or consent to the dismissal. She lived in a remote part of the state, and the mere absence of herself and counsel at a term of the court when her case was called is insufficient, without other evidence, to convict her of having abandoned her demand. *Prall v. Peet*, Curator, 3 La., 282; *Dunn v. Kenney*, 11 Rob., 250; *Roswood v. Duvall*, 7 La. Ann., 528; *Mechanics' and Traders' Bank v. Theall*, 8 La. Ann., 469.

After the interruption of the prescription by the filing of the bill by the complainant, the defendants could no longer claim to be in possession *in good faith* as that is defined in the Civil Code. In article 3415 the possessor in bad faith is he who possesses as master, but who assumes this quality when he well knows that he has no title to the thing, *or that his title is vicious and defective*. The possessor must not only not be in bad faith, but in the positive belief that he is the true owner, and if he doubts the validity of his title, his possession is not the basis of prescription. *Troplong*, Prescription, vol. 2, p. 451, No. 927; *id.*, p. 444, No. 918; *id.*, p. 442, No. 915. The plea of prescription is not available in this case.

§ 628. *An heir or legatee is not bound in Louisiana by the unsanctioned action of an executor.*

But the defendants go further, and insinuate that their possession of the property, though beginning with the executors, Relf and Chew, continued afterwards under Mary Clark, whose power of attorney to them authorized them to sell the estate of Clark.

When Relf and Chew proved the will of 1811, they received the estate of Clark as executors, with a right of detainer for one year, and for as long afterwards as the court of probate might permit upon their application, showing cause for the delay or the extension of a longer time. They did receive such an extension for three years upon their representation that the nature of the estate, the difficulty of the time, and the ample sufficiency of the estate to pay all of its debts, would enable them by the delay to accomplish that result. The creditors were called upon to meet to consider the proposition. They assented to it. But the executors never fulfilled the arrangement, either for the benefit of the creditors or for the legatees under the will of 1811. Nor did they ever make any return to the court of probates of their transactions relative to Clark's estate until 1836, after the complainant had sued them, and then without vouchers to homologate their receipts, expenditures and payments, except for a small part. Shortly after the application for an extension of time, in the year 1813, they applied for a power of attorney from Mary Clark, who had been named in the will of 1811 as universal legatee, to authorize them to sell the estate in her behalf. The power was given; and under it,

without any notice to the court of probate, which ought to have been given, and the power filed in it, they continued, as the testimony in this case shows, to act as executors, and to dispose of the estate of Clark, both real and personal, property in copartnership, and other property separately belonging to Clark, without ever having received any permission to do so from the court of probate, and that should have been obtained, as Mary Clark had not been acknowledged by that court as the universal legatee of Clark. It may be that they mistook their powers in doing so, but they received the estate of Clark in a fiduciary character, to be accounted for to the legatees and creditors, according to their rights under the law of Louisiana, and for that they are responsible. Besides, the power from Mary Clark was given to them as executors, that she might have the benefit of those responsibilities for the faithful execution of the trust that they were under by the law of Louisiana as executors. They paid debts, received moneys, sold property, and acted throughout as if they were not responsible to the court from which they derived their testamentary letters, or to Mary Clark, and, as the record in this case shows, without sustaining their transactions by vouchers of any kind.

Nothing is better settled by the decisions of its courts in Louisiana than "that an extrajudicial statement by an executor, that he believes the debt to be due by the estate, does not bind the heir, nor is the heir bound by the approval of a court as to such a claim, if it be made *ex parte*." 4 La., 382. Again, that the admission of the genuineness of the signature to vouchers filed by the curator of a succession in support of his account, dispenses with any other proof of the payment claimed; but when such payments are made *without an order of the court*, the curator must show that the debts were really due by the succession, or he will not be entitled to credit for the amounts so paid. *Miller v. Miller*, 12 Rob., 88. A receipt given to an administrator for the payment of an account is not evidence that the account was due, if the fact of being due is disputed. *Moore v. Thebadeaux*, 4 La. An., 74. So an administrator who renders an account is bound to establish the items of it by evidence, and may be held to strict proof by the parties interested without a formal opposition on their part. *Succession of Lea*, 4 La. An., 579. The accounts of Relf and Chew were put in evidence by the defendants, and they were used to show, among other things, that they were authorized to sell the estate of Clark as they did, and that they were auxiliary for the establishment of the defendant's plea of prescription. Such, however, is not our opinion, and but for the use made of them, we should not have noticed them at all, not thinking that they are put in issue by the bill of the complainant or the answer of the defendants, particularly as Relf and Chew are not parties to this proceeding.

§ 629. *The denial of the rights of a "forced heir" does not debar from claiming as legitimate child and universal legatee under the will.*

We will now proceed to the consideration of that point made in the argument by the counsel of the defendant, but more particularly representing the city of New Orleans, as he said he did. It was that complainant's suit could not be maintained because it was *res adjudicata* by this court in its judgment in the case of *Gaines v. Relf*, 12 How., 506.

We do not think so. That case is misunderstood by the learned counsel. Then the parties went to trial upon the demand of Mrs. Gaines for one-half of her father's estate, as the donee of her mother, his widow, and as *forced heir of her father* by the law of Louisiana for four-fifths of another half of his estate.

Her bill then was brought in consequence of this court having decided in 6 Howard, 550, that there had been a lawful marriage solemnized in good faith between them in Philadelphia. That case was tried upon the same evidence upon which the appeal was determined in 12 Howard, with the exception of what is miscalled an ecclesiastical record from the Cathedral church in New Orleans, of which we shall have much to say hereafter. Besides having decided in 6 Howard that there had been a lawful marriage between the complainant's father and mother, this court decreed that Mrs. Gaines was the lawful and only issue of the marriage; that at the time of her father's death she was his only legitimate child, and was exclusively invested with *the character of his forced heir*, and as such was entitled to its rights in his estate.

The judgment in that case has never been overruled or impaired by this court. It certainly was not intended to be by the case in 12 Howard, for the report in that case shows, from the number of justices who sat upon its trial, and their decision as to the judgment then to be rendered, that the majority of them did not intend to overrule the decree in 6 Howard. It was recognized again as still in force by a majority of the judges who sat in this case in our consultation. The defendant in the case of 1851 (12 Howard, 537), admitted that such a decree was rendered, denying, however, that it was conclusive upon or that it ought to affect their right; and if it could do so, it ought not to have such an effect in that instance, averring the same as a matter of defense, that the decree was brought about and procured by imposition, combination, and fraud, between the complainants and Charles Patterson. That it should not be regarded in a court of justice for any purpose whatever, and that it had been consented to by Patterson to enable the complainant to plead the same as *res judicata* upon points in litigation not honestly contested. Mr. Janin was mistaken when he said that the decree in 6 Howard, 583, had been reviewed in the case of 12 Howard, 537, meaning thereby that it had been overruled. It was not only not so, but one of the justices who assented to the judgment in 6 Howard, which declares that there had been a valid marriage between Daniel Clark and Zulime Carriere, and that she was the legitimate child of that marriage, would not assent to its being done when he concurred in the decree in 12 Howard.

The decision in 12 Howard does not, either in terms or inferentially, assert that no marriage had ever taken place between Daniel Clark and the complainant's mother. The issue in that case was, that at the time of the complainant's birth her mother was the lawful wife of another man, namely, of Jerome Des Grange. It was, therefore, essential to the defendants to get rid of the decree which had affirmed the legitimacy of Mrs. Gaines and of the marriage of her father and mother, and it was attempted by a contrivance as extraordinary in its beginning as it was abortive in its result. We will show what it was from the record, not only on account of its anomalous character, but because it is unexampled in jurisprudence.

After having asserted that the decree in 6 Howard had been obtained by the fraud of Patterson and General Gaines, thus impeaching the credibility of Patterson in advance, the defendants, Relf and Chew, introduced him as their witness (Old Record, pp. 590, 591, 592, 593, 594), and he was examined by their counsel, first as to a suit in which Mrs. Gaines had recovered a house and lot from him. After stating his age to be about seventy, his answer was: "It was for a house and lot on which I resided when the suit was brought; I still reside in that house and lot, and have done so ever since the suit was brought.

Mrs. Gaines succeeded in the suit, according to the judgment of the court. That house and lot belongs to her, but they told me they would not take it from me. General Gaines and his wife gave me in writing under their hands that they would not take the property from me; that he would make my title good. The property has always been assessed as mine, and I have always paid the taxes on it. I paid most of the costs, but they paid me again — that is, General and Mrs. Gaines. There was an understanding between us that they would pay the costs, even should the suit be decided against me. They made the same offer to Judge Martin.” In his cross-examination, witness said he had made the best effort in his power, with the aid of able counsel, to defeat Mrs. Gaines in her suit. The cross-examination was resumed the next day, 20th June, 1849. Patterson was asked to look upon a document marked A, and to state if he knew the handwriting of the late General Gaines; whether the signature to it was not his; whether he had received that, or a communication of which that was a copy, prior to withdrawing his dilatory pleading in the case of *Gaines v. Relf and Chew et al.* and filing your answer to the merits of that case. The defendants, by counsel, protested against the paper being put into the record, on the ground that it contained false, malicious and gratuitous imputations against parties in nowise connected with the suit. Witness then answered, that was the signature of General Gaines; he had often received letters from him, and seen him write, and that he had received two or three communications, of which that was a copy, before he withdrew his dilatory pleadings in that case, and answering to the merits. A letter was then handed to witness, marked B. He answered, the body of it was the handwriting of General Gaines; was present when he wrote it, and saw both General and Mrs. Gaines sign it. Then the following question was put to the witness: “At the trial of your cause with Gaines and wife, did not your counsel make a request of the counsel of Mrs. Gaines to be permitted to introduce the record from the probate court of New Orleans of all the proceedings of Mrs. Gaines in the prosecution of her rights in that court?” Witness answers: “Yes, sir; her counsel objected to that, and I applied to General and Mrs. Gaines to introduce the record. They replied to me to get all the evidence possible, the stronger the better. General Gaines remarked it would be more glorious to have it as strong as possible. I then caused it to be introduced.” Here the cross-examination of the witness was closed. The counsel for the defendants objected to the foregoing testimony, and especially to that part which relates the conversations of the complainants with the witness, and that part which details what was done in a *judicial proceeding, on the grounds*, among others, that it is incompetent for the complainants to make evidence for themselves, and that *what had been done in judicial proceedings should be shown by the record*. And from that gentleman’s accurate knowledge of his profession, indicated as it has been by the two lines just underscored, may we not say in the zeal of professional advocacy that the best of us may forget it? for what has been his interrogation of Patterson but an attempt to invalidate a judgment against him by the testimony of the most interested party to have it annulled, without having made any appeal to the record of that judgment? And Patterson was the defendant’s witness.

But we have not yet done with this attempt to prejudice the rights of Mrs. Gaines by suggestions that her suit with Patterson was pretensive and fraudulent, and to extract from him some proof or confession of his own infamy.

After the examination in chief and the cross-examination had been completed

and signed by the witness, and both counsel had announced that they had concluded their examination, the counsel for the defendant made another objection to the cross-examination of Mr. Patterson, insisting that it should be considered as his examination in chief by the complainant, to which the defendants had the right of cross-examination; and the witness was recalled on the following day for that purpose. Every effort was then made by many questions to extract from him some inconsistency with his first examination, without success. But fortunately for his own character he removes the imputation of fraud and combination between himself and General Gaines, to give to the latter the benefit of a collusive judgment in the circuit court against himself, by having, in his answer to one of the questions, alluded again to the documents A and B, which are now presented as conclusive against the charge that there was ever any combination between them, by trick or by contrivance, or by any deceitful agreement or compact, for a suit to be brought by one against the other to defraud any third person of his right. See Old Record, pages 1018 for document A, and 819 for letter B. And when the witness was asked if he had not been particularly requested by the General and Mrs. Gaines to use his best exertions, with the aid of the best counsel he could employ, to make every defense in his power to this suit of which it was susceptible, he answered: Yes, and I did so; and I considered the agreement with General and Mrs. Gaines as an act of liberality on their part, growing out of a desire to come to a speedy trial with some one or more of the defendants on the merits of the case.

It was an indiscreet arrangement between General Gaines and Mr. Patterson, not to be tolerated in a court of justice, but not one of intentional deception in contemplation of any undue advantage. And it would never have been made by Relf and Chew, in their answer to the subsequent bill of the complainant against them, had they not been erroneously advised that the decree in 6 Howard, establishing the marriage of Clark and Zulime Carriere, and the legitimacy of Mrs. Gaines, might be used as *res judicata* against the defendants in the suit of the 20th January, 1849, and as they now attempt to make the decision in that case a *res judicata* against the claims of Mrs. Gaines in this which we are now deciding.

But what was decided in the case in 12 Howard? It is stated in the language of the decision, "that the first and most important of the issues presented is that of the legitimacy of Mrs. Gaines." Then are stated the pleadings under which the issue was made. It shall be given in the language of the decision: "She (Mrs. Gaines) alleges that her father, Daniel Clark, was married to Zulime Nee Carriere, in the city of Philadelphia, in the year 1802 or 1803, and that she is the legitimate and only legitimate offspring of that marriage. The defendants deny that Daniel Clark was married to Zulime at the time and place alleged, or at any other time and place. And they further *aver* that, at the time the marriage is alleged to have taken place, the said Zulime was the lawful wife of one Jerome des Grange. If the mother of the complainant was the lawful wife of Jerome des Grange at the time Zulime is alleged to have married with Clark, then the marriage is merely void, and it is immaterial whether it did or did not take place. *And the first question we propose to examine is as to the fact whether Zulime was Des Grange's lawful wife in 1802 or 1803.*" Then follows the recital of the marriage between Des Grange and Zulime, with the record of it, on the 2d December, 1794, admitted on the part of Mrs. Gaines. To rebut and overcome the established and admitted fact of

that marriage, the complainant introduced witnesses to prove "that previous to Des Grange's marriage with Zulime he had lawfully married another woman, who was living when he married Zulime, and was still his wife, and therefore the second marriage was void, *and this issue we are called on to try.*"

Then it is said that "the marriage with Des Grange having been proved, it was established as *prima facie* true that Zulime was not the lawful wife of Clark, and the *onus* of proving that Des Grange had a former wife living when he married Zulime was imposed on the complainant; she was bound to prove the affirmative fact that Des Grange had committed bigamy." Then follows the recital of the testimony of the complainant to prove that Des Grange became a bigamist by his marriage with her mother. And then, to "meet and rebut this evidence, the defendants introduced from the records of the Cathedral church of the diocese to which New Orleans belonged at that period, an ecclesiastical proceeding against Des Grange for bigamy, which respondents insist is the same to which complainants refer." It is set out in full in the decision, beginning at page 513 in 12 Howard, extending to 519, inclusive. Then the rebutting testimony of Daniel W. Coxe, for a long time a copartner in business with Clark, was introduced. He states an antecedent connection between Clark and Zulime to the time of their alleged marriage, with a confidential letter to him, which was delivered by Zulime, in which it was stated that she was pregnant, and that he, Clark, was the father of the child; further requesting that he would put her under the care of a respectable physician, and furnish her with money during her confinement and stay in Philadelphia; and further, that she gave birth to a child, who was Caroline Barnes, who before her marriage went by the name of Caroline Clark, and that what has been related happened in 1802; and he further states that Clark was not in Philadelphia in 1803, having gone to Europe in August, 1802, and having returned to New Orleans early in 1803. A letter from Des Grange was introduced, dated at Bordeaux, July, 1801; also a suit for alimony brought by Zulime against Des Grange, in 1805, which will be further noticed in the opinion. Then it is said: "This is substantially the evidence on both sides on which the question depends, *whether Des Grange was or was not guilty of bigamy* in marrying Maria Julia Nee Carriere in 1794. Objections are taken to several portions of this evidence, and especially as respects the record of the suit against Des Grange for bigamy in the ecclesiastical court." And though this is followed in the decision by a suggestive, able and searching commentary upon the objections made to the testimony of the defendants, and upon that of the complainant, by connection and comparison of the two, and upon what was deemed the law of the case, all of it relates exclusively to disprove that Des Grange was married, and had a wife alive when he married Zulime.

The announced conclusions in that case, which were seven in number (12 Howard, 539), show it to have been so. It was "the question decided," and was said "concludes this controversy." The factum of marriage between Clark and Zulime, and the legitimacy of Mrs. Gaines, as both had been decreed by this court, were not then disaffirmed, either directly or inferentially, and all that was said about it is, "that the decree of this court in Patterson's case does not affect these defendants, for two reasons: 1. Because they were no parties to it; and 2d, because it was no earnest controversy. It is our opinion that the decision made in the case in 12 Howard was not intended to reverse the decree in 6 Howard, and that it cannot be so applied as *res judicata* to the case we are now trying.

§ 630. *Louisiana law as to res judicata.*

We will now show the difference as to the character in which Mrs. Gaines then sued, and that in which she now does, in connection with the law of Louisiana, as to what constitutes a *res judicata*, and what does not. In the first, her demand was for one-half, and four-fifths of another half of the property owned by her father when he died. She then claimed as the donee of her mother to the one-half, and as *forced heir of her father* to four-fifths of another half of his estate. Now she claims as universal legatee and legitimate child of her father, under his will of the 13th July, 1813, which has been admitted to probate by the supreme court of Louisiana, and ordered to be executed as such. The difference between the two cases is just that which the law of Louisiana will not permit the decision in the first to be pleaded against her in this case as a *res judicata*.

It is declared in the article 2265 of the Louisiana code, "that the authority of the thing adjudged takes place only with respect to what was *the object of the judgment*. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be made between the same parties, and formed by them against each *other in the same quality*."

The case in 12 Howard and that now under our consideration are dissimilar as to parties and things sued for, or what is called "the object of the judgment." The suit now is not between Mrs. Gaines and Relf and Chew, but between herself as complainant, and Duncan N. Hennen as defendant. Nothing was said in the first suit of the claim of Mrs. Gaines under the will upon which she now sues, as in every particular detailed in the article 2265. There are differences between her present cause of action and that formerly made, and the demand now made is not between the same parties, or formed against each in the same quality. And, therefore, upon well-settled principles coincident with the article 2265, and also independent of it, nothing that was said or done in the case in 12 Howard can prejudice her claim as she now makes it. We give the authorities for that position, that they may be consulted, without being able, for want of time, to show their application by extracts. 24 Wend., 585; 14 Pet., 406; 1 Dana, 109; 3 Wend., 27; 2 Sim. & Stuart, 464; 6 Wheat., 109; 7 Cranch, 565; 3 East, 346; 4 Gill & J., 360; Preston v. Slocumb, 10 Reports (Louisiana), 361; 1 Annual, 42; 3 Annual, 530; 10 Annual, 682; 3 Martin, 465; 7 Martin, 727; 7 Reports, 46. And the precise point was ruled in Burt v. Steinberger, 4 Cowen, 563-4, "that the defendant might have shown, if he could, that he had acquired a title since the former trial, or any title other than that which had been passed upon in the former trial."

We are fully satisfied from the article 2265, and the cases cited from the Louisiana courts, and from the English and American reports, that the objection of *res judicata*, as made against the recovery of the complainant in this case, is without any foundation in law.

§ 631. *The inquisition, its history, and its jurisdiction of marriage and bigamy in Louisiana law.*

We have now reached the last and most important objection made against the complainant's recovery. But before discussing it directly, we must dispose of the ecclesiastical record, which was much relied upon in the argument to repel the evidence of her legitimacy, and to establish the fact that the marriage between her father and mother was unlawful, from her having been then the lawful wife of Jerome Des Grange; in other words, that Des Grange did not commit bigamy when he married her, by which she was not released from

her conjugal relations with him, and had not the right to marry any other man who was free to contract marriage.

We have seen that exceptions were taken to the admissibility of that record as evidence when it was first presented by the defendant's counsel in the case before the circuit court. They were renewed upon the appeal here. They were continued when the defendants introduced it again into this case, and it is necessarily before us to be determined as a question of law, whatever may have been thought of it heretofore, either by judges or by counsel.

Our first remark concerning it is, admitting that the canon law, as sanctioned by the church of Rome, was in force in Louisiana at the time of this procedure, it was a mere assumption, without authority in its beginning, tyrannous against the object of it, and irregular in its action. It was a nullity, *coram non iudice*, before the canon who issued it. The presbyter canon who assumed to do so was not vicar-general or governor of the bishopric of Louisiana and the two Floridas. He was only the presbyter canon of a vacant see, without delegation by commission or deputation from a bishop to represent him in his spiritual offices and powers. He had no canonical power in his pastoral charge of a particular church and congregation to originate a prosecution for bigamy. Nor would either archbishop or bishop, had there been either then in Louisiana, have ventured to do so in the condition at that time of the ecclesiastical practice and royal ordinances of Spain, especially in their application to its foreign possessions. And such a procedure was a direct violation of the *Instituciones de derecho canonico Americano* por El Rev. Sr. D. Justo Donoso.

The inquisition, as it had existed for more than a hundred years in France and Italy, was introduced into Spain by Gregory IX., about the middle of the thirteenth century. It encountered no opposition there. It at first attained a prevalence and extension of power larger than it had exercised before, and was on the increase when Spain became an united kingdom under Ferdinand and Isabella. They were authorized by the bull of Sextus IV. to establish the inquisition in their states. And then it was invested with jurisdiction of heresies of all kinds, and also of sorcery, Judaism, Mahomedanism, offenses against nature, and polygamy, with power to punish them, from temporary confinement and severe penance to the *san benito* and the *auto de fé*. Before that time the inquisition had exercised a capricious jurisdiction, both as to persons and creeds. *Encyclopædia Britannica*, 8th edition, 11th vol., art. *Inqui.*, page 386. In its new form it met with opposition. Attempts were made in Castile and Arragon to repulse its authority and to restrain the holy office, as it encroached upon government and deprived the people of many of their ancient rights and privileges. Its power, however, became triumphant, and so aggressive upon the royal authority that it was resisted by the kings of Spain, as well in the kingdom as in its foreign possessions.

It cannot be expected that we shall enter chronologically into such a detail. We will verify what has just been said by distinct citations from the laws of Spain and royal ordinances.

The first of these ordinances which we shall cite is that of Charles I. of Spain (5 of Germany), issued at Madrid on the 21st September, 1530. *Leyes de Indias*, tom. 1., livre 1, titulo 10, page 48.

Charles had been about twelve years in Spain. The mines of the west had begun to throw their treasures into Spain. They were essential to the accomplishment of the political and military designs of the king, and to his

necessities also. Complaints were constantly being made of the rigors of the inquisition upon the Indians in his western dominions, and upon his subjects who had emigrated to them in large numbers in pursuit of gold. It was said but for such causes that the yield of gold would have been larger. The king determined to restrain the holy office in its jurisdiction, and issued his decree of September 21, 1530. We give Judge Foulhouse's translation of it: "We order the attorneys, police officers, sheriffs, and other ministerial officers of the prelates and ecclesiastical judges of our West Indies, islands and continents along the ocean not to arrest any layman, or issue any execution against him or his property, for any reason whatever; and we order all clerks and notaries not to sign, seal or take any deposition with regard to the same, or for any reason thereto relating; and whenever ecclesiastical judges shall judge necessary to have a person imprisoned or an execution issued, they shall pray for the royal aid of our secular justices, who shall grant it according to law. And all vicars and ecclesiastical judges shall observe this order and comply with it, as is prescribed by this law, under penalty of losing the *status* and privileges which they enjoy in the Indies, and of being there held as foreigners and strangers to the same. And any of said attorneys, police officers, sheriffs, clerks and notaries, and any other who do the contrary, shall be forever exiled from all of our Indies, and all of their goods shall be confiscated for the profit of our royal treasures; and we hereby direct and empower all of our justices, and all of our subjects and settlers, not to consent thereto, and let the attorneys or executing officers do so, too; and we order that this ordinance be observed, any contrary custom notwithstanding."

The ordinance of Charles was followed by another of his son, Philip 2, which declared "that, whenever in our royal courts of the Indies, the aid of the secular arm shall be asked by the prelates and ecclesiastical judges, either for an arrest or for execution, the demand shall be by petition, and not by requisition." These royal ordinances will be found in the recopilacion in the Indies. They were declared by a law of Don Carlos 2, one hundred and thirty years after they were promulgated, to be existing laws, on the 18th May, 1680. See the law to that effect preceding the *Titulo Primero* in *Libro Primero*, fo. 1, *Recopilacion Leyes de Indies*. They have had their places in every edition of the recopilacion since. Indeed, they were never abrogated, and were in practical operation in all of the dominions of Spain in America until she lost them.

They establish satisfactorily that the presbyter canon, Hasset, when he issued his prosecution against Jerome Des Grange for bigamy and imprisoned him, that he did so contrary to law, and that his whole proceeding in the matter was a nullity, and, as such, inadmissible as record evidence in a secular or ecclesiastical court. *Recopilacion de Leyes de los reynos de las Indies*; en Madrid, por Andres, Ortega, ano. de 1774; tercera edicion, page 48.

But there are other royal ordinances establishing what has just been said in respect to the nullity of that procedure, because they bear directly upon the incapacity of the ecclesiastical power to originate a prosecution for bigamy. The first of them which we shall cite is a cedula of March 19, 1754, in which it was declared that polygamy was a crime of a mixed nature, in which the royal tribunals may take cognizance in the first instance, with this qualification, that, if the inquisition wishes to punish the accused for suspicion of heresy, he shall be remitted to it after having suffered the legal penalties. *Leyes de Indies*, c. 1, tit. 19, not. 2.

But this cedula was modified in 1761 by Charles 3, leaving to the inquisition cognizance of this crime, and reserving only to the secular courts the power to take informations, and to arrest the accused, in order to deliver him to the inquisition. This concession was made by the king, who ascended the throne at a period peculiarly critical, requiring the conciliation of every agency in his new kingdom to meet the pressure of political difficulties, and to allay discontents and suspicions against himself, which subsequently became a revolt. He was charged with being opposed to the inquisition, from having been on the throne of Naples for several years, where it had never been introduced, the people having always resisted its establishment over them.

But the prudence of the king did not restrain the inquisition from the assertion of its jurisdiction in that and in other particulars offensively to the ancient usages and rights of Spain. In its eagerness to extend its power it invaded the royal authority, and stretched its jurisdiction to every cause in the slightest degree connected with ecclesiastical discipline or punishment. The king resisted it, and he was soon furnished with a cause for doing so. The inquisition having taken from the auditor of the army a process instituted against an old veteran who was accused of bigamy, the jealousy which the king in fact entertained against the inquisition was revived. His vigilant minister, D'Aranda, used it to obtain a royal decree ordering the process against bigamy to be restored to the civil or secular courts. It also enjoined upon the inquisition to abstain from interfering with the proceedings of the secular courts; required it to confine itself to its proper functions in the prosecution of apostacy and heresy; forbade it to "defame with imprisonment his vassals before they were *previously and publicly convicted*," and commands the inquisitor-general to require the inquisitors to observe the laws of the kingdom in cases of that kind; and further, all the king's royal tribunals, judges and justices were ordered to keep and obey the decree, and to punish those who should violate it in any manner whatever. This was the decree of Charles 3, of the 5th of February, 1770, cited by Judge Foulhouse in his opinion upon the nullity of the proceedings against Jerome Des Grange, by the assumption of the presbyter canon, Hasset, of the Cathedral church of New Orleans. For the royal decree of the 5th February, 1770, see original, the *Novissima Recopilacion*, vol. 5, p. 425; Coxe's *Memoirs of the Kings of Spain*, 3 vol., ch. 57, page 367.

Thus stood the jurisdiction of the inquisition in respect to the crime of bigamy restrained by royal authority for six years. Complaints were then made of the uncertainty of the royal cedula of the 5th February, 1770, especially in respect to the extent of its interference with the power of the holy office to inquire for discipline and for punishment into cases of polygamy. The king was induced to call a *toro* or council, to discuss the different relations and boundaries between the secular and ecclesiastical cognizances of the crime of bigamy. The result of that council was communicated to the king on the 6th September, 1777. It was that a majority of it had come to a conclusion, that by the act of marrying a second time whilst the first wife was alive, the person who does so violates the faith due to the marriage contract; that he deceives the second wife and wrongs the first; inverts the order of succession, and of the legitimacy established by the laws, *inasmuch as his fraud makes the children of the second matrimony, though truly adulterine, legitimate, and capable to inherit from their parents* on account of the good faith of their mother in contracting that marriage; further, that the kingdoms

of Spain assembled in cortes had established penalties against the crime of **bigamy**, commanding that they should be imposed by the royal courts, and **declaring** that they should not be embarrassed in their cognizance of the offense; also, that he who marries a second time, his first wife being living, **offends** the ordinary jurisdiction in maliciously deceiving the curate to assist at a null marriage, and that on that account there is ecclesiastical jurisdiction to inquire into the validity or nullity of marriages; but that it was to be done without embarrassing the royal courts in their cognizance of the offense. It was then said that such persons may also incur the crime of a false profession of the sacraments, which was exclusively within the jurisdiction of the holy office; which was, however, to be exercised reciprocally by it and the secular courts, to prevent the repetition of the offense by the imposition of penalties which belong to each, and by the delivery of prisoners from one to the other to be tried. Upon the foregoing report being made to the king, he gave a royal order to be communicated to the inquisitor-general, that by his cedula of the 5th February, 1770, the holy office was not impeded in the cognizance of the crimes of heresy and apostacy, and of persons declared subject to suspicion of bad conscience by the violation of apostolic bulls which had been received and enforced in Spain with royal consent, in those cases in which the jurisdiction of them was in the holy office. This royal resolution was followed by another decree, remitted to the alcaidro and to the chancery and audiences of the kingdom on the 20th February, 1782. *Novissima Recopilacion*, page 425 of vol. 5, Ley. 10; note 1, tercera edicion, Madrid, por Andres, Ortega, 1774.

The result of the council, however, of which we have just given the particulars, did not satisfy the grand inquisitor. Attempts were made to reassert his assumed jurisdiction in all its plenitude, both in Spain and its foreign dominions. The holy office was on its decline. This was its last great struggle for existence. The king had long resided in Naples, where the inquisition was regarded with the same horror as among Protestants. Though partaking of the same feeling, he was too prudent to trample on the prejudices and opinions of his Spanish subjects, or to make a direct attack against that great engine of ecclesiastical authority. He had witnessed the danger of precipitate reforms and of shocking national prejudices in matters however beneficial. He adopted in his long reign the only maxim which could be pursued with safety, and perhaps the only means to produce the intended effect. He endeavored to check the oppressions, to soften the rigors, and to circumscribe the authority of the inquisition, and thus prepared the way for time and circumstances to produce its total abolition. In the pursuit of this design he was seconded by the energy and liberal principles of his minister, Florida Blanca. The principal restrictions of De Aranda were gradually revived; and in 1784 the celebrated decree was issued, which partially subjected the proceedings of the holy office to the cognizance of the sovereign. It was ordered that no grandee, minister, or any person in civil or military service of the crown, should be subjected to a process without the approbation of the king. Thenceforth this formidable tribunal became feeble in its operations, and was suffered only to give such displays of its authority as were calculated to weaken the public veneration. *Coxe's Memoirs of the Kings of Spain*, vol. 3, pp. 526, 527, etc. Under the reign of the son of Charles, the prince of Asturias, his successor in Spain and the Indies, "the inquisition received a still heavier shock, and before the late revolution it had become a mere tribunal of police, to arrest the progress

of political rather than of religious heresy." It was finally abolished in Spain in 1808.

It appears, then, from the royal ordinances which have been cited, that from the time of the introduction of the inquisition into Spain the extent and manner for the exercise of its jurisdiction were subject to the regulations of royal ordinances; that it had been so restrained in polygamous cases, its jurisdiction in them having been confined to inquiries connected with the validity or nullity of marriages, and to the infliction of penances for the violation of the ecclesiastical law in respect to them. It had not the power to initiate a process in a case of bigamy for the punishment of it, but in subjection to the royal ordinances, or to institute in the Indies, after those ordinances were passed, an inquisitorial tribunal concerning it before the accused had been convicted in the secular courts.

Such was the law of Spain in respect to prosecution for bigamy, and the sunken condition of the inquisition, when no ecclesiastic, however high may have been his dignity, would have ventured to make such a decree as was issued by the presbyter canon of the Cathedral church of New Orleans against Jerome Des Grange for bigamy. It had all the form and more than the vigor of the holy office. It was entitled "criminal proceedings instituted against Geronimo Des Grange for bigamy by the vicar-general and governor of the bishopric of this province, and attested by the notary, Franco Bermudez." The canon subsequently styles himself canonical presbyter of this holy Cathedral church, which he was; but adds that he was provisory vicar-general and governor of the bishopric of the province, which he was not. This assumption was either ignorance, or was intended to give consideration to himself or to the prosecution. He was neither provisor nor vicar-general. For the manner in which those functions were deputed by the bishop, we refer to the third volume of the *Instituciones de Derecho Canonico Americano*; Appendice Primero, pages 394, 395, 396, 398. The decree purports to have been issued on the 4th of September, 1802. It begins by saying that it had been publicly stated in this city that Geronimo Des Grange, who had been married in 1794 to Maria Julia Carriere, was at that time married before the church to Barbara Jeanbelle, and is so now, who has just arrived; and also that Des Grange, having just arrived from France a few months since, has caused another woman to come here, whose name will be obtained. It is also reported in all the city, publicly and notoriously, that Des Grange has three wives, and not being able to keep it a secret, etc., etc., his excellency has ordered, in order to proceed in the investigation and the infliction of the corresponding penalty, that testimony be produced to substantiate his being a single man, which Des Grange presented in order to consummate the marriage, and that all should appear who can give any information in the matter, etc., etc. And as it has been ascertained that Des Grange is about to leave the city with the last of his three wives, let him be placed in the public prison during these proceedings, with the aid of one of the alcaldes, this decree serving as an order, which his excellency has approved, and as such it is signed by me, notary. Before me,

FRANCO BERMUDEZ.

(Signed) THOMAS HASSETT.

It is not necessary to cite any of the proceedings upon that paper or to speak of the frequently-occurring notarial certificates of Francisco Bermudez. The whole of it, however, shows that what was done was so under his contrivance and auspices. The canon, Hassett, is made to begin as an ecclesiastic

in authority, and signs the decree, but places the execution of it and the imprisonment of Des Grange upon an order of his excellency. It is twice referred to in the paper as a part of it. It should have been produced with the other proceedings. Without that being done, no part of it can be received in evidence as the record of an authentic judicial tribunal. The whole paper is a novelty in the proceeding of an ecclesiastical court. His excellency means the chief alcalde of the city, who had no legal authority under the law of Spain to sanction such a prosecution, or to order the execution of it, either by the introduction of testimony or the imprisonment of the accused. The paper signed by Franco Cassiergues is insufficient for that purpose.

The procedure of the holy office in such cases will be found in the article Inquisition, in the eighth edition of the Encyclopædia Britannica, volume 12, page 389. It establishes the fact that the canon, Hassett, and Bermudez, intended to proceed against Des Grange according to the forms of the holy office, and that at a time when its functions in such particulars had ceased in Spain and in the Indies. Those who are curious may also find directions for such a procedure in Burns' Ecclesiastical Law, and in Oughton's Ordo Judiciorum sive Methodus Procedendo in Negotiis et Litibus in foro Ecclesiastico Civili Britannico et Hibernico, 2d volume, Mr. Bentham also, in his Rationale of Judicial Evidence, specially applied to English practice, volume 2, book 3, chapter 17, pages 380 to 403, exposes with cogent reasoning and admirable satire the artifices of the early English ecclesiastics, and their success in getting up a similar initiation of a prosecution in contravention of English statutes.

Before leaving the paper we have been examining it is proper for us to allude to the testimony of Judge Foulhouse given in this case, and to his opinion given afterwards in confirmation of its invalidity.

When he was examined as a witness it was distinctly understood between the parties, and agreed to, that the defendants might make a motion to suppress his testimony. That was not done. We cannot infer from it that the counsel of the defendants acquiesced in the witness' conclusion that the paper from the Cathedral church was inadmissible as evidence, but it is certainly good cause for the reliance placed by counsel in their argument of the cause upon the learned judge's declarations, and his support of them by his researches. He cites from the Partida, 7 tit., law 16; Novissima Recopilacion, book 12, tit. 28, law 16; Novissima R., book 12, tit. 28, law 10; the last being the cedula of Charles 3 in a case of imputed bigamy, ordering the inquisitor-general to direct the inquisitors to take cognizance of the crimes of heresy and apostacy, bigamy being considered by the canon law as a kind of heresy, without assuming to do so "*by defaming the accused with imprisonment before they had been previously and publicly convicted.*"

For the reasons given, supported by the royal ordinances of Spain, we have been brought to the conclusion that the paper from the Cathedral church of New Orleans, introduced by the defendants as a part of their evidence in this case, is inadmissible as such, and that all which it contains must be disregarded by us in the judgment we shall give.

We finally remark that our extended examination of that paper has not been made because of its essential bearing upon the merits of the case of the complainant. It was to disabuse the record of what did not legally belong to it, and to correct misapprehensions which might arise unless its character and import had been legally shown. Give to it, however, the fullest credence, and

it will be seen that it can have no effect upon the law of adulterine bastardy, upon which this case must be decided, which we are now to consider.

§ 632. *An averment in an answer not responsive to any allegation in the bill must be proved by defendant.*

This brings us to the chief objection which was made in the argument, and most relied upon to defeat the recovery of the complainant. It is that her *status* of adulterine illegitimacy incapacitates her from taking as legatee under the olographic will of her father, though admitted to probate, as it has been by the supreme court of Louisiana.

It is an averment of the defendant in his answer to the complainant's bill, but not in response to any allegation in it. It changes the attitude of the litigants from what it was in the case of *Gaines v. Relf and Chew*, in 12 Howard. Then Mrs. Gaines had the burden of proof to establish affirmatively the fact that she was the forced heir of her father, and the donee of her mother, his widow. This court at that time did not think that had been satisfactorily done, and dismissed her suit without affirming for or against the factum of marriage between her father and mother. Indeed such a point could not have been made, or be supposed to have been intended to be decided, by the court in the case then in hand, without expressly overruling its decision in 6th Howard, that there had been a lawful marriage between Daniel Clark and Zulime Carriere, her father and mother, and that Mrs. Gaines was their lawful child. To get rid of the force and effect of that decision, the defendants, having only charged before that she was the offspring of an illicit intercourse between her father and mother, invoked the church papers of which we have spoken so much, in the hope of establishing from it that she was an adulterous bastard. And again, with the aid of that which is not evidence in the case, *and with much that is so*, they now rely to establish that charge. Mrs. Gaines meets the charge with new evidence, relying upon the old also, and with the declaration of her father in his last will, that "I do hereby acknowledge that my beloved Myra, who is now living in the family of Samuel B. Davis, is my legitimate and only daughter, and that I leave and bequeath unto her, the said Myra, all the estate, whether real or personal, of which I may die possessed, subject only to the payment of certain legacies hereinafter named." And with this presentation of herself, of which she had never had the proof before, asked that the case might be judged according to the evidence *and the laws applicable to it*. What that proof is will be arrayed hereafter in its proper place. Now we only remark that the burden of proof is upon the defendant, and that the law applicable to such a declaration in a will, concerning a child, requires that there shall be full proof of the contrary of it, and will not be satisfied with *æmi plena probatio*.

§ 633. *The law of Louisiana on the subject of illegitimacy as to succession by will or inheritance.*

But the law regulating the sufficiency of proof for the disaffirmance of such a declaration in a will cannot be fully understood and appreciated, unless our recollection shall be revived of the differences made by the ecclesiastical law and that of Louisiana as to the kinds of illegitimacy, and the disabilities and privileges attending them. In fact and in law they differ. The rights and capacities of illegitimates depend upon the distinctions being preserved.

If one be a bastard, from having been born, as the code expresses it in article 27, of an illicit connection, though they cannot claim the rights of legitimate children, yet, if they have been duly acknowledged by their fathers and mothers,

leaving no lawful children or descendants, they, as natural children, will be called to the legal estate or succession of *the mother*, to the exclusion of her father and mother, and other ascendants and collaterals of lawful kindred. And in the case of their father's succession or estate, they may be called to the inheritance of it when he has acknowledged them, and has left no descendants, no ascendant, no collateral relations nor surviving wife, and to the exclusion only of the state. But though natural children, and known to be so, they can take by testament or will from their father, if born before their father's will were made. And here we have the reason, in the differences of their right of succession to their fathers and mothers, why Clark made his olographic will in favor of his legitimate daughter Myra; fearing from the clandestinity of his marriage, and other circumstances attending it, that her legitimacy would be denied, notwithstanding his habitual and daily acknowledgment of it, unless it was proclaimed and avowed in his will. They take or inherit by wills of their fathers, if born before the wills were made. As of a devise that B. shall stand seized of land to the use of Jane his daughter. This would be a good devise to her if she were reputed to be so, though she were a bastard, and not so called in the will. Dyer, 323, pl. 29; S. C., Jenk, p. 239; 41 E., 3-13. But this does not extend to a bastard born after will made. Sid., 149; 39 E., 3-24; 3 Leon, 48; Rivers' Case, 1 Atk., 410; Hardin v. Stardin, 2 Ves. Jr., 589; Blood v. Edwards, Cro. Eliz., 509, 510; Coke, Litt., 123, B; *Ex parte* Wallop, 4 Brown, C. C., 90; Kinnel and Abbott, 4 Ves., 502.

A bastard in *esse*, whether born or unborn, is competent to be a devisee or legatee of real or personal estate. The only question in such a case is whether, when in *esse*, the bastard is sufficiently designated as the object of the bequest. Gordon v. Gordon, 1 Meriv., 141; Bayley v. Snelham, Sim. & Stu., 78; 2 Powel on Devises, by Jarman, p. 260; Co. Litt., 3-6, and note 1; Dyer, 313; Noy, 35; Park, 26; 3 Leon, 48, 49. But we ought to mention in this connection whether a gift can be made to a bastard not procreated is *verata questio*. The early authorities certainly lean to the negative. The reason assigned is, "that the law does not favor such a generation, nor except that such shall be." Bloodwell and Edwards, Cro. Eliz., 509; Co. Litt., 3-6.

So that we see by the foregoing authorities, had it been proved in this case, or in any of the cases which the complainant has brought for her rights in her father's estate, that she was the offspring of an illicit intercourse, which we affirm it never has been, she would now be in the condition, from her father's testamentary declaration of her legitimacy, to take as his universal legatee. And if the case was made to turn upon that now, the complainant would be entitled to a decree; but it does not.

It is said, as an adulterous bastard, produced by an unlawful connection between two persons, who at the time when the child was conceived were either of them or both connected by marriage with some other person, the complainant cannot take under the olographic will of her father, because the code forbids it. The articles 217, 222, do forbid the legitimation or acknowledgment by their fathers and mothers of adulterine children. The article 914 does say that in no case can adulterine children inherit the estates of their fathers and mothers — that is, as acknowledged natural children may do, by the articles 912 and 913 of the code. And it is declared by the fourteen hundred and seventy-fifth article of the code, "that natural fathers and mothers can in no case dispose of property in favor of their adulterine or incestuous children, unless to the mere amount of what is necessary to their sustenance,

or to procure them an occupation or possession by which to support themselves." This is the prohibition upon which the defendants rely to defeat the complainant.

The application of it, however, to the case in hand, was not as fully considered by the learned counsel for the defendant as it might have been. We will make it, with a decided Louisiana case for everything that shall be said, and by authorities for every general proposition cited, akin to the subject-matter. The article containing the prohibition necessarily intends that the relation of the parties shall be such as it mentions, before it can have an effect upon either of them.

Now, we say, first, that the legal relations of adulterous bastardy do not arise in this case; for, independently of the declaration of the will that the complainant is the legitimate child of Daniel Clark, this court having decided in 6 Howard that the marriage of Clark to Zulime was valid by reason of the invalidity of her previous marriage with Jerome Des Grange, that, of course, makes the complainant legitimate. But if it be assumed, as it was in the argument, that, by the decision in 12 Howard, the marriage of Clark to Zulime was invalid on account of the validity of her marriage with Des Grange, then still Myra is legitimate *by the law* as the offspring of a *putative marriage*.

§ 634. *In Louisiana, where a marriage is made in good faith, etc., the issue thereof is, to a certain extent, legitimate, though the marriage itself be void.*

The cases from the Louisiana reports are conclusive. The articles in the old code, 119, 120, are to this effect, that if both parents, or either of them, contracted the second marriage *in good faith, the issue of it will be legitimate*. So it was ruled in the case of Clendening v. Clendening, 3 New Series, 438. The language of that case is, "that the plaintiff resists the claim on the succession of his father by a woman he married in the life-time of his wife, the plaintiff's mother, and of the children, if born of that woman. The defendants contend that, notwithstanding the plaintiff's father had a lawful wife at the time of his second marriage, that as the woman he last married was in good faith at the time of the marriage, and ever since, at least till after the birth of the last child she had by him, her marriage has its civil effects; and that she and her children, the present defendants, are entitled to all the advantages the law gives to a lawful wife and children. There seems to be no dispute on the question of law. The woman who was deceived by a man who represents himself single, and the children begot while the deception lasted, are *bona fide* wife and children, and as such are entitled to all the rights of a legitimate wife and issue." The plaintiff then urged that four of the children were born after the good faith of the woman ceased, as she had been advised of the illegality of her marriage by a communication made to her that her husband had another wife living in Tennessee. The court, however, said the proof of this knowledge was insufficient to deprive herself and her children of their rights, though one witness swore he communicated that fact to her.

The next case came up before the new court organized in Louisiana under the constitution of 1845. It is that of Patton v. The Cities of Philadelphia and New Orleans, 1 Ann., 100. The facts were that, in 1799, A. Morehouse married Abigail Townes in the state of New York, and had two children by her. He subsequently came to the Spanish colony of Louisiana and gave out that he was a widower, and married Elenore Hook. In the act of marriage, he declared himself the widower of Abigail Townes. By the second wife he had children, and both wives survived him. It was said, "the decision of the

late supreme court in the case of *Clendening v. Clendening*, 3 Mart. (N. S.), 438, in relation to the good faith of the second wife, is a correct application of the Spanish law, which regulated the subject-matter at the time of the marriage of the plaintiff's ancestor. By the law, 1 title, 13, part 4, it is ordained, that if, after both parties know with certainty the existence of the impediment to the marriage, they beget children, these children will not be legitimate; yet if, during the existence of such impediment, and while *one or both of them* was ignorant of it, they should be accused before the judges of holy church, and before the impediment, as proved in the sentence pronounced, they should have children, those begotten during the existence of the doubt will all be legitimate. We agree with the plaintiff's counsel, that the second wife, and all the children conceived during her good faith, have all the rights which a lawful marriage gives." In this case, also, it was said that the second wife was informed of the existence of her husband's first wife; "but the court answered, the evidence establishes nothing more than the existence of a doubt."

We now give the case of *Olive Abston et al. v. Rebecca Abston et al.*, decided in 1860, by the supreme court of Louisiana. Its ruling is coincident with the two previous cases cited, upon a statement of facts concurring with them, but more particular in detail. Olive Abston sued to have herself recognized as the lawful surviving wife of John Abston, deceased, late of the parish of Carroll, claiming she was entitled to a portion of the property of his succession. Her son, John N. Abston, the issue of her marriage with John Abston, deceased, joined in the action, for the purpose of having himself recognized as the legitimate son and lawful heir to the estate of his deceased father. John N. Abston is the exact case of Mrs. Gaines. The suit is against Rebecca Wright, the third wife of John Abston, deceased, and *the administrator of his succession or estate*. He intervened in his capacity of tutor of Nancy Nix Abston, the minor child of the defendant, the issue of her marriage with the deceased, claiming in behalf of the minor the rights of legitimate and forced heir in the succession of John Abston, her father. Rebecca Wright pleads in general denial, and avers that she was lawfully married to John Abston, deceased, in Warren county, in the state of Mississippi, and that, if the plaintiff's alleged prior marriage was ever consecrated, it was unknown to her, and to all other persons residing in the state of Mississippi. She filed, also, a supplemental answer, averring that her husband, John Abston, had made in the state of Mississippi his will, leaving to her his whole estate, after the payment of his debts, and that the will had been admitted to probate in the parish of Carroll, in Louisiana.

The facts of the case were these: John Abston married with Olive Hart, his first wife, and plaintiff in this suit, in the state of Alabama. John N. Abston, the co-plaintiff in the suit, and other children, were the issue of that marriage. John Abston abandoned his family in the state of Alabama without having been divorced, *a vinculo matrimonii*, from his first wife, contracted a second marriage with one Susan Bell, and she died. After her death, and being still undivorced from his first wife, he intermarried in Mississippi with Rebecca Wright. In a short time after this last marriage he removed from Mississippi into Carroll county, in the state of Louisiana, where he acquired a new domicile, and where he died, in which was situated the whole property of his succession, movable and immovable, at the time of his death.

This narrative, and the relations as they have been given of the parties to the suit, raised two questions which it became necessary for the court to de-

cide before it gave its opinion upon the question of the legitimacy of the two sets of children of John Abston, the bigamist, and father of them, and the rights of his two wives in his estate. First, as to the effect of the probate of the will, it being contended, as that had been done by a court of competent jurisdiction, that it could not be questioned collaterally, nor its validity be inquired into in the suit. The court declared that the decree of a probate court ordering a will to be executed does not amount to a judgment binding on those who are not concerned in it, and that when the will is offered as the title in virtue of which property is claimed or withheld, its validity may be inquired into. *Sophie v. Duplessies*, 2 La. An., 724; *Succession of Dupuy*, 4 La. An., 570. The other question raised was, whether the rights of the parties in the suit should be determined by the law of Mississippi, where the marriage of the defendant and the deceased had been contracted, or by the law of Louisiana, where John Abston had his domicile at the time of his death, where his succession was opened, and where all his property was situated. The answer to that question was, that the laws of Louisiana which regulate the right of succession make no distinction between persons who have contracted marriage in or out of the state, nor the issue of such marriages, whether born in or out of the state. If they have the qualities required by the law in matters of inheritance, they will be recognized as legal heirs without regard to the places of marriage or birth.

The court, then, with a proper regard to the fact that the will which had been made by John Abston *was invalid on account of its not having been attested by three witnesses, and that the succession was an intestacy*, determines that it could not be regulated by the law of Mississippi, as the plaintiff contended it should be, the basis of which is the common law, but that it must be by the law of Louisiana. We prefer to cite its own language as to the similitude and the differences between them: The prior marriage of the deceased with the plaintiff, which remained undissolved, was a legal disability under the common law, which made the marriage with defendant, Rebecca Wright, not merely voidable but void *ab initio*, and made their issue illegitimate, and incapable of succeeding by inheritance to the estate of any one. By the law of this state the disability of a prior marriage undissolved also renders the second marriage null and void; *but the legal consequences of a marriage void ab initio under our law are very different from those under the common law.* The Civil Code declares that "the marriage which has been null nevertheless has its civil effects in respect to the parties and their children, if it has been contracted in good faith. If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage." "In two cases, somewhat similar to the present, it has been held that each wife was entitled, at the death of the husband, to one-half as the community property, after the payment of debts; and this rule will govern our decision in this case." *Patton v. Philadelphia*, 1 La. Ann., 98; *Hubbett v. Inksleon*, 7 La. Ann., 25. The mandate of the court was accordingly given, with this further decree, that John N. Abston, the plaintiff, and that *Nancy Nix Abston, the minor, represented by the intervenor*, are entitled as heirs-at-law to the separate property or estate of their deceased father, John Abston, and the costs of the appeal were directed to be paid, one-half by the plaintiff, Oliver Abston, and the other half by Rebecca Wright, the defendant.

But in further confirmation of what has been the Spanish law, and, of

course, that of Louisiana, in legitimating the children of those who marry in good faith, believing upon good ground that there was not a precedent marriage to prevent it, we cite from the *Novissima Recopilacion*, 5th vol., 425, N. Ley. 10, what was said in the council allowed to be held by Charles 3, king of Spain, in the year 1777, for the purpose of giving to the inquisitor-general a better understanding than he professed to have concerning the king's royal ordinance of 1770 concerning the jurisdiction of the holy office in bigamy and polygamous cases generally.

The result of that council, and so recognized by the king, was: "That, by the act of marrying a second time, whilst the first wife was alive, the person who does so violates the faith due to the marriage contract; that he deceives the second wife and wrongs the first; inverts the order of succession and of the legitimacy established by the laws, inasmuch as his fraud makes the children of the second marriage, *though truly adulterine, legitimate, and capable to inherit from their parents on account of the good faith of their mother in contracting that marriage.*"

To the same effect is the Code Napoleon. C. Cer., arts. 201, 202. The law of France was so before the code. Pothier, *Contrat du Mariage*, vol. 3, pp. 107, 172; Toullier, tome 1, 598; Marcadi, *Explication du Code*, tome 1, 520; Law of Spain, Partida, 4 Lex, tit. 13, v. 1; Dalton's Dic., tome 2, 372; Tit. Mariage, 372.

Thus we see, though a child may be adulterine in fact, it may be legitimate for all the purposes of inheriting from its parents, if one or either of them intermarried in good faith. Such is the law for others in Louisiana, and it must be administered accordingly for the complainant, if she stands in the position, by the evidence, which the law requires and has determined to be sufficient to establish a marriage *in good faith* between her father and mother, *or as to either of them*, to entitle her to inherit from either or both of them *as legitimate by the law*.

On such a question, good faith is first to be presumed. Marcadi, *Explication*, tom. 1, pp. 522, 698. As to what constitutes good faith, it is adjudged that to marry a second time, supposing the previous marriage invalid, is one of the cases of good faith. Dalton's Dic., tom. 2, p. 371; Tit. Spain, No. 578. The two last citations have been given to show the inaccuracy of the conclusion of the learned counsel of defendant that, if the invalidity of the marriage between Des Grange and the complainant's mother was not proved, she was necessarily an adulterine illegitimate. She was heir-at-law, if procreated by Clark in good faith, or if conceived by her mother in good faith,—that is, she supposing her capacity to become the wife of the former.

Nor was a sentence of the nullity of the marriage between Des Grange and the complainant's mother necessary to protect the legitimacy of the offspring. Marcadi, *Explication*, tome 1, p. 495; id., p. 519; 2 Phillimore's Reports, 19; Shelford on Marriage, Law Library, vol. 31, p. 275. The good faith of Clark and Zulime is proved by the evidence of Madame Despau (Old Rec., 580) and Madame Calliant (Old Rec., 309), and by the contemporaneous facts relating to the marriage, as well as by the testimony of Caviliere (Old Rec., 546) as to the bigamy of Des Grange, by the testimony of Bellechasse, by that of Madame Benguerel. Old Rec., p. 349. The good faith of Clark in marrying is proved by his own declarations in the last years of his life. By Bellechasse's testimony (Probate Record, 173), Boisfontaine (id., 162), Mrs. Smyth's (id., 152). Again: the good faith of the marriage is proved by the authentic declaration

of Clark in his will that the complainant was his legitimate daughter and only child. See, also, the opinion of the supreme court of Louisiana, Charles Succession, 11 La. Ann.

§ 635. *The testamentary recognition of the legitimacy of a child is of the highest legal authority.*

But we now say, if we are to consider the question of adulterine bastardy to be properly before us in this case, it cannot affect the rights of the complainant under the will of Clark of 1813. If the complainant, by reason of the matrimonial character of her mother, shall be deemed adulterine on that side, she is not so on the side of her father, he having been, as a single man, free to marry; and if he did marry in good faith, she is not incapacitated, as respects him, to be, under his will, his universal legatee. Journal du Palais, vol. 60, p. 45, January 7, 1852.

There is no pretense that Clark was incapable to contract marriage; and it matters not whether, as to the mother of the complainant, any impediment existed under the Spanish law; the complainant stands as the declared issue of her father by a woman to whom he supposed himself lawfully married. Not only the bill itself, but the evidence upon which it is established, shows that Daniel Clark had no other legitimate issue. No one exists who has any right to contest his acknowledgment of the legitimacy of his child, or to set up the adulterous source of her origin. See C. N., art. 335, 2 Marcadi, pp. 31, 51, 52, Nos. 60, 61, 62; Journal du Palais, vol. 60, p. 45; Jobert *et al.* v. Pitot Ex'ors, 4 Annual, 305; Judge Foulhouse's Opin., 57, 58; 2 Toulliers, 960.

The testamentary recognition of a child as legitimate is of the highest legal authority. All presumptions are to be taken in favor of such a declaration. Matthews on Pres. Ev., pp. 284, 286; Gaines v. Chew, 12 How., 593; Miller v. Andrews, 2 La. Ann., 767; Jarman on Wills, vol. 1, p. 188; 5th Phillips' Note, 284, 287, and authorities cited; 1 Greenl. Ev., 134. And we now cite, in confirmation of all that has been said upon this point, the 117 Nouvelle of Justinian. It gives the rule of evidence in such cases, and it prevails in every ecclesiastical court in Europe, where the Roman law is the basis of its jurisprudence, in respect to the legitimacy of persons. It is also, in cases of that kind, the law of Louisiana.

We give it in the original Latin: "*Ad hoc autem et illud sancire perspeximus, ut si quis filium aut filiam habens de libera muliere cum qua nuptias consistere possunt, dicat instrumento, sive publica, sive manu conscripto et habente subscriptionem trium testium fide dignorum, sive in testamento, sive in gestis monumentorum, hunc aut hanc filium suum esse, et non adjecerit naturalem, hujusmodi filios, esse legitimos, et nullam aliam probationem ab iis quæri, sed omni frui eos iure quod legitimis filiis nostræ conferunt leges.*" Translation: "We have determined to ordain, that if any one having a son or daughter of a free woman, with whom he might have been married, shall say in a written act, either before a public officer or under his own hand, sustained by three credible witnesses, or in his last will, or in public acts, that this son or this daughter is his child, and that he does not call them natural children, they shall be *reputed legitimate*, and no other proof shall be demanded of them, and they shall enjoy the rights of legitimate children." This Nouvelle has been the subject of much criticism and learned interpretation by the most distinguished civilians. By no one more so than the Chancellor d'Anguesseau, in his declaration or ordinance of 1736, which had for its object, as he himself says, to explain and affirm the proofs of the legal condition of men. The declaration consists of

forty-two articles. Several of them relate to the form in which baptismal acts ought to be registered to give verity to legitimates; but whether they are so or not, this ordinance of Justinian secures to children legitimacy, if they shall be placed by their fathers or mothers within its predicament. And we may add that the interpretation of it by all who have been skilled in the civil law is, that it attaches legitimacy to the son or daughter of a man and woman who are both free, but that it does not demand that the word legitimate should be applied to them to make them so. On the contrary, the *Nouvelle* means that if the child is not called a natural child he is of right to be reputed legitimate, and the commentator's remark is: "Mark well that this is not a Roman law made when paganism reigned in Rome, but a law made by a christian emperor." Merlin, *Repertoire de Jurisprudence*, 17th vol.; Tit. Legitime, secs. 1 and 11, pp. 348, 349; Ed. Bruxelles, 1827; Question d'Etat; On la previe testimoniale ne ful point admise, tome 8; Causes Celebres Filiation Reclamée, Sans acte de baptime, sans une Veritable Possession d'Etat, sur le fondement, de plusieurs forte consecretures; tome 19, Causes Celebres, 204.

Such as we have stated it to be is the law relating to the children of a *putative* marriage, though it be adulterine in fact, if it was contracted in good faith by the parties, or by either of them. Their children are legitimated to inherit from their parents, either in a case of intestacy or to take by testament. In the latter a declaration by either father or mother that they are their children, without the addition that they are natural children, will make them legitimate, and no other proof can be demanded of them to enable them to enjoy all the rights of legitimate children. But the case in hand is even stronger than that, for here the father in his will "acknowledges his beloved Myra to be his legitimate and only daughter," and makes her the universal legatee of his estate after the payment of certain legacies.

But the defendants aver that the connection between her father and mother was adulterine, even though they may have been married, and on that account that she is barred from taking as legatee under her father's will. We will now give the proofs upon which they rely to substantiate their allegation, in connection with the voluntary rebutting testimony of the complainant, as we find it in the record.

The paper from the Cathedral church in New Orleans is first invoked by the defendants. Now, though that paper has been shown to be an unauthorized attempt by a canonical prebendary, without jurisdiction of any kind in such a matter, upon a public report, to try Des Grange for bigamy, for having three wives at the same time, and to make him answer by imprisonment, whether such an irresponsible accusation was true or not true the defendants in our consideration of their averment shall have the full benefit of that paper as evidence, though we have declared it to be inadmissible as such.

Des Grange, it appears from the paper, was put in the public prison and kept there until the canon, Hassett, after having examined several witnesses, decreed: That not being able to prove the public report, he directed the proceedings to be suspended, to be resumed thereafter if it should become necessary, and that Des Grange should be set at large, on condition that he paid the costs. This he did, and fled from New Orleans, without ever having again any conjugal relations with the mother of the complainant, though as it will directly appear from the paper that he was indebted to her for his enlargement from the canon's usurped authority. Nor did Des Grange reappear in New Orleans until after the cession of Louisiana to the United States.

In the course of the proceedings against Des Grange, both himself and the complainant's mother were examined as witnesses. Both of them reply to questions concerning his bigamy in respect to his marriage in 1794 with her; acknowledged that they were aware of the report prevailing against him in that regard; and she says that about a year since (in 1801) it was stated in the city that her husband had been married at the north, and wishing to ascertain whether it was true or not, that she had gone to Philadelphia and New York, where she used every exertion to find out the truth of the report, and that she learned only that he had courted a woman, whose father not consenting to the match it did not take place, and she married another man shortly afterwards; and she adds, that she had recently heard that her husband was married to three women, but she did not believe it, nor had she any doubt about the matter which rendered her unquiet or unhappy. All of this Des Grange confirms; for, being asked why his wife, Maria Julia Carriere, went to the north last year, he answers: "That the principal reason was, that a report had been circulated in this city that he was married to another woman; she wished to ascertain whether it was true, and she went."

Thus the defendants, by the introduction of the paper from the cathedral, show the existence and currency of the report of Des Grange's guilt of bigamy in marrying the mother of the complainant, and the aggravation of it in the public mind by the prosecution of him, and from the canon not having dismissed it altogether, but having retained it for further inquiry. Upon his enlargement, as has been proved by unimpeachable testimony, Des Grange fled.

§ 636. *In a civil suit the confession of a bigamist of his guilt may be sufficient evidence of it.*

Now, in this connection, it is appropriate to state the evidence which the law will receive and pronounce to be sufficient to determine that he did commit bigamy when he married the mother of the complainant. It so happens, excluding all admissions of it to the family of the mother of the complainant, the fact is proved by a witness, the truthfulness of whose testimony has not been assailed, and could not have been.

Madame Benguerel has no connection with the family of the complainant, and her standing and character were such that the defendants could not impeach her credit by even an insinuation against either; but she was subjected to their cross-interrogation. It brought out neither difference nor contradiction of herself, nor was there anything in the way in which she gave her testimony to subject her to any suspicion of friendship to the complainant, or of any want of memory or uncertainty in her narrative.

Madame Benguerel says: "My husband and myself were very intimate with Des Grange, and when we reproached him for his baseness in imposing himself upon Zulime, he endeavored to excuse himself by saying that at the time he married her he had abandoned his lawful wife, and never intended to see her again." In answer to a cross-interrogatory put upon the point, she says: "I am not related to the defendants, nor with either of them, nor am I with the mother of Myra; nor am I at all interested in this suit." She adds: "It will be seen by my answers how I know the facts; I was well acquainted with Des Grange, and I know the lawful wife of Des Grange, who he married before imposing himself in marriage upon Zulime."

The paper then discloses the following facts: That Des Grange was notoriously charged with bigamy in marrying Zulime; that she left New Orleans

"for the north" in 1801 to get proof of it; that he says that her principal reason for going was for that purpose; that he was prosecuted for bigamy by the canon in 1802, and was temporarily released from prison after Zulime had sworn that she did not believe the report about him. It is in proof, also, that he then fled from New Orleans, and did not return to it until the year 1805. Her interference or testimony before the canon negatives every suspicion that she had any agency in instigating the prosecution against him. His own oath upon the occasion confirms it, for he speaks of his wife being satisfied with his innocence, and there is not a word in the paper nor in any of the evidence to show that her friends had provoked or abetted in any way the public accusation of his bigamy. Nor is Clark, the father of the complainant, at all associated with that procedure. Indeed, he was in Europe at that time. With all these facts and obvious inferences from them, taken in connection with the testimony of Madame Benguerel, the only question concerning the bigamy of Des Grange in marrying the mother of the complainant when he did, is whether the law determines the evidence to be sufficient in a civil suit to establish the fact.

We think that the law requires us to pronounce that it is sufficient.

A charge of bigamy in a criminal prosecution cannot be proved by any reputation of marriage. There must be proof of actual marriage before the accused can be convicted. But in a civil suit the confession of a bigamist will be sufficient when made under circumstances from which no objection to it as a confession can be implied. There are none such in this case. The first legal consequence of such a state of the evidence is, that it released the mother of the complainant from all conjugal obligations with Des Grange, making her free to contract marriage with any other man who was free to intermarry with her. But that conclusion is not the purpose for which we have used, as the defendant wishes it, what the church paper discloses. The object has been to show that the defendants have introduced that paper in support of the charge of adulterine bastardy, when in fact it discloses a condition of things from which it may well be inferred that both the father and mother of Mrs. Gaines intermarried in good faith. It is far short of the evidence in the record to prove that they did so, which will be seen presently. Then the next testimony which the defendants rely upon to aid in proving the adulterine *status* of the complainant is that of Daniel W. Coxe, the friend and copartner in business with Daniel Clark. His testimony was originally taken in a previous case to invalidate the marriage between Clark and the mother of the complainant. In 12 Howard, as it was in this case, it was associated with the church paper to sustain the objection we are now considering. In the argument it was said that the two were sufficient to prove it. But take the testimony of Mr. Coxe as a whole, or in its particulars, and no part of it has the slightest bearing upon the canon's prosecution of Des Grange, or upon the objection that the complainant was the offspring of an adulterous intercourse. Mr. Coxe begins with the history of Caroline Barnes, giving an account of the preparations which he had made at the solicitation of Daniel Clark for the confinement of her mother, and then states it to be his belief that Clark had never married her. Beyond this, in regard to the marriage, he does not speak, except in his offers to the success of his effort to dissuade her from attempting to prove it, and that he did not believe that Daniel Clark was in Philadelphia in the year 1803, when it is alleged that he married there the mother of the complainant. Many other circumstances are narrated by Mr. Coxe in connec-

tion with the affairs of Mr. Clark, and of his acknowledgment of Caroline Barnes as his illegitimate child. But after the closest examination of them in connection with the point of adulterous bastardy, and that Clark and Zulime, after the birth of Caroline, were married in good faith, there is not a word in Coxe's testimony to impeach the fact of marriage or the fidelity of the parties in entering into it.

The defendant also gave in evidence a letter written by Bellechasse, from Matanzas to Coxe, in reply to one from the latter. Coxe had written to Bellechasse at the instigation of Mr. Relf, requiring him to dispose of fifty-one lots in favor of Caroline Barnes, to the exclusion of the complainant, for whom they were confided by Clark to him for her benefit. This Bellechasse refused to do. He then states what had previously passed between Relf and himself concerning these lots. He had before given to Relf his renunciation of any ownership of them, with directions to dispose of them for Myra, stating what had passed between himself and Clark upon the subject, as he has related it in his testimony. Probate Record, pages 173 to 182, inclusive, answer to thirteenth interrogatory. This letter does not relate in any way to the marriage between Clark and the complainant's mother, or to their alleged adulterous intercourse. It, however, confirms the honorable character of Bellechasse, and strengthens all that he had said of Clark's declarations to him of the legitimacy of his daughter Myra, and of his intentions to make her the heiress of his estate. This letter seems to us to have been introduced into this case by the defendants, with some expectation that it might serve to make Bellechasse's testimony equivocal, and also to associate both Myra and Caroline as the adulterine offspring of Clark and Zulime. The attempt, in our view, is a failure as to both. The complainant's *status* depends upon the evidence in this case. That of Caroline Barnes, notwithstanding the declarations of Coxe that she is the natural child of Clark by Zulime, must be determined by the law as to what were the relations between her mother and Des Grange when she was conceived and born. The witness, Madame Despau, says that she was at the birth of Caroline, and that it took place in 1801. Mr. Coxe says, to the best of his belief, that she was born in the year 1802, but without any of those attendant circumstances which give even a coloring to the correctness of his chronology as to the event of which he was speaking, and with one proceeding from himself, which shows how little reliance can be put upon the accuracy of his memory, either as to the time when he says Mrs. Des Grange presented to him Clark's letter to have her taken care of in her confinement, as she was with child by him, or as to the time of the birth of Caroline, or as to Clark's visits to Philadelphia immediately preceding his departure for Europe in the year 1802. In Mr. Coxe's second examination, he states it had been disclosed to him by his correspondence with Clark that the latter had been in Philadelphia from late in 1801 to the last of April, 1802, all of which time Zulime was there; that it was in April that Clark returned to New Orleans, and afterwards that he had revisited Philadelphia in July, 1802, on his way to Europe; thus confirming the statement of Madame Despau in those particulars. In the absence of all contrary proof, either by circumstance or deposition, the declaration of Madame Despau as to the time when Caroline Barnes was born must be received to establish that fact. And that being in the year 1801, however much it may be suspected that she was the child of Clark, and even that he supposed her to be so, she must be considered in law to be the child of Des Grange, the gestation of her mother and the birth of the child being within

the time before any interruption had taken place of their conjugal relations. That is proved by evidence introduced into the case by the defendants. The first is the power of attorney of the 26th of March, 1801, given by Mesdames Caillavet, Lasabe, and Despau, authorizing Des Grange, their brother-in-law, to proceed to Bordeaux, in France, to recover property of which they were co-heiresses of their father and mother. Next, by a general power of attorney, which Des Grange at the same time gave to Zulime to act for him in all his affairs during his absence. She did so in several particulars, styling herself the legitimate wife and general attorney of Don Geronimo Des Grange. Des Grange accepted the power given to him, sailed for France in April, and on the 1st July, 1801, wrote from Bordeaux to Clark to aid his wife with his advice, should she be embarrassed in any respect, and expressed his uneasiness that he had not yet heard from her, saying, also, that he was then engaged in a "lawsuit for the purpose of recovering an estate belonging to my wife and family." Now, under such a chronology of circumstances and of conjugal amity, we need not say that as access between man and wife is always presumed until otherwise plainly proved, and that nothing is allowed to impugn the legitimacy of a child short of proof by facts showing it to be impossible that the husband could have been the father of it, the law then establishes the relation between Des Grange and Caroline as having been that of father and legitimate child, and that she was not the offspring of an adulterous commerce between Clark and Zulime; though Coxe says she was, and reaffirmed substantially in his letter to Bellechasse, as we gather from his answer in his refusal to turn over property to Caroline which was received by him from her father for Mrs. Gaines. See letter in page 896 of Record of Gaines v. Hennen.

§ 637. *A decree of divorce for the cause of bigamy relates back to the void marriage, and sets the petitioner free from that time.*

The defendants also gave in evidence an authenticated record from the county court of New Orleans. It was introduced by them, and declared by them in their answers to the complainant's bill, to be a petition by her mother, Zulime Nee Carriere, wife of the said Des Grange, to a competent judicial tribunal in New Orleans, praying for a divorce and dissolution of the bonds of matrimony existing between her and Des Grange, which was subsequently decreed after the birth of the complainant. But they now urge and declare that such record and decree prove nothing in the case. In our opinion it proves much, though differently from what it was introduced for. Their counsel now says that the record is deficient in the petition, and therefore that it does not appear that its object was the annulment of the marriage between Zulime and Des Grange on account of his bigamy. The petition is wanting; and why, has not been satisfactorily shown by the defendants. They knew it to be wanting when they introduced the record of evidence, and on that account cannot now repudiate it for what it contains, because that is against the purpose for which it was introduced. It shows that a petition was filed; that a curator was appointed for Des Grange; that he was summoned to answer for Des Grange; that he appeared and demurred to the jurisdiction of the court *in cases of divorce*, and on that account that the court could not pronounce a judgment therein, and that the damages prayed for in the petition could not be assessed until after the court had rendered judgment touching the validity of the marriage. There was a joinder in demurrer, which, however, was withdrawn, and the curator filed the general issue. The docket

entries in the suit, kept by the clerk, are in conformity with the act of April 10, 1805, section 11. They are as follows: Petition filed June 24, 1806. Debt or damages, \$100. Plea filed 1st July, 1806. Answer filed July 24, 1806. Set for trial 24th July. The witnesses are stated and the costs given. And then follows judgment for plaintiff, damages \$100, July 24, 1806. Now, this extract of so many particulars makes out as well as it could be done the purpose of the petition, and establishes consistently, as it is required to be done, by the rules of evidence for such a case, that the marriage between Jerome Des Grange and Zulime, or, as otherwise named, Marie Julia Nee Carriere, was thereby declared null and void. But the defendant's counsel says, that the record is inoperative for any purpose, inasmuch as it was a proceeding at the instance of Zulime in her maiden name, three years after her alleged marriage with Clark. It is forgotten that a judicial invalidation of marriage at any time for the bigamy of a party to it relates back to the time of the marriage, and places the deceived in a free condition to marry again, or to do any other act as an unmarried woman, without any sentence of the nullity of the marriage. The evidence, too, shows that the procedure by Zulime against Des Grange originated in her anxiety to place herself in that condition in respect to her marriage with Clark, which he had enjoined upon her to keep secret until a sentence of the nullity of her marriage with Des Grange had been obtained. She could not, under such circumstances, use Clark's name in such a suit; she could not have sued in Des Grange's when disclaiming the validity of her marriage with him; and therefore her counsel in filing her petition used her maiden name, as it was proper and professional in them to do. One thing is certain, that the record from the county court of New Orleans does not in any way sustain the charge against this complainant of adulterine bastardy, but adds another circumstance to the many which exist in proof of the marriage between her father and mother, and of the good faith with which they entered into it.

To confirm what has just been said we will now cite the evidences of it: "Madame Despau testifies that she was at the marriage of Zulime and Clark in 1802 or 1803; that it took place in Philadelphia, and the ceremony was performed by a Catholic priest in the presence of other witnesses as well as of herself. She states that she was present when her sister gave birth to Mrs. Gaines; that Clark claimed and acknowledged her to be his child, and that she was born in 1806. That the circumstances of her marriage with Daniel Clark were these: Several years after her marriage with Des Grange she heard he had a living wife. Our family charged him with the crime of bigamy in marrying Zulime. He at first denied it, but afterward admitted it and fled from the country. These circumstances became public, and Mr. Clark made proposals of marriage to my sister with the knowledge of all our family." The witness then continues her narrative, that it was considered essential before the marriage should take place that proof should be obtained from the Catholic church in New York of Des Grange's bigamy, it being there that his prior marriage had taken place. They went there; found that the registry of marriages had been destroyed. Clark followed them, and having heard that a Mr. Gardette in Philadelphia had been one of the witnesses of the prior marriage of Des Grange, and he told them that he had been present at the prior marriage of Des Grange; that he knew him and his wife; that the wife had sailed for France. Clark then said, you have no reason any longer to refuse

to marry me; it will be necessary, however, to keep our marriage secret until I have obtained judicial proof of the nullity of your marriage with Des Grange. They were then married.

Such judicial proof was subsequently obtained as has already been shown. Another witness, Madame Caillavet, confirms the statement that Clark made proposals of marriage for Zulime to her family after her withdrawal from Des Grange, on account of her having heard that he was the husband of another woman then alive. She also swears that Clark admitted the marriage to her and that so did Zulime. Clark also made an acknowledgment of it to other witnesses, with simultaneous declarations to them of the legitimacy of Myra; and his paternal treatment of her from her birth to his death impressed them with the full belief of the fact and of the sincerity of the purposes for which he made such declarations. Mrs. Harper, who nursed Myra, not as a hireling but as the friend of Clark, says that he made to her at different times declarations of the child's legitimacy and of his marriage with her mother. He admitted it also to Boisfontaine, and added that he would have avowed the marriage but for her subsequent marriage to Gardette. Pressed upon by such proofs, every effort was made by the most searching and repeated cross-examination to lessen the force of them, without success. Failing in this, a direct attempt was made to discredit their veracity by an impeachment of their characters. It was a signal failure. Forty years of their lives were canvassed to bring upon them some reproach. The proofs to the contrary were decisive. They, too, had had their misfortunes; but their lives had been passed in the different places where they had lived, not only without censure but altogether free from suspicion. Their testimony was also put in comparison with that of Mr. Coxe. They do differ in immaterial circumstances, but in nothing concerning the marriage between Clark and Zulime. All that Coxe had been able to say about that was that he did not believe it. That conclusion, too, he came to by inferences from his own narrative concerning the time of the birth of Caroline Barnes; that he withdrew afterwards as to the time of its occurrence, and also as to his declaration that Clark had not been in Philadelphia in the year 1801, extending his sojourn there for more than four months, whilst Zulime and her aunt were in search of proofs of the bigamy of Des Grange. The evidence also shows that Clark aided their inquiries for that purpose. Besides the want of memory of Mr. Coxe, his narrative shows so strong a bias against the marriage that we must receive it with many grains of allowance. After Zulime had obtained a sentence of the nullity of her marriage with Des Grange, she went to Philadelphia to learn the truth of reports which were in circulation concerning the fidelity of Clark to herself. She had an interview with Coxe; told him her purpose and her intention to proclaim her marriage with Clark, unless she became satisfied upon that subject. He told her that she could not prove her marriage, and afterwards advised her to take counsel of a lawyer. He, of course, dissuaded her from any attempt to do so. At the same time Coxe aggravated her distress and hopelessness by telling her that Clark was then engaged to marry a lady of distinction in Maryland, which, whether true in the particulars of his narrative of it or as a general report, there is no proof in this record; but it served his purpose in disuniting Zulime and Clark forever. Clark was then in the height of his popularity and distinction in the congress of the United States. His friend sheltered him from the disclosure. Mrs. Harper, as a witness to Clark's admission to her repeatedly of the marriage, was cross-examined severely, but without any effect to

diminish the weight of her testimony in chief. Bellechasse and Boisfontaine, in their subsequent examinations, adhered to what they had at first sworn, and their characters forbade even a suspicion of its not being true.

Failing in every attempt to lessen the proof of the marriage, it was suggested that all of these witnesses were in combination to establish it by perjury. The defendant's counsel had himself extracted from their answers that they had no interest of any kind in the result of the suit. They are protected by the rules of evidence from any such imputation. There was no foundation for it.

The marriage, then, having been proved, the only point remaining is, whether it was contracted in good faith by the parties to it. We see no cause for thinking that it was not entered into in good faith. Supposing it, however, not to have been so by Zulime, on account of her not having sincerely believed in the invalidity of her marriage with Des Grange, that could not take away the complainant's right to inherit her father's estate under his olographic will of 1818, if it has not been fully proved, as the rules of evidence in such cases require it to be done, that he did not marry in good faith. The doubts which may be indulged in respect to Zulime's sincerity cannot apply to him. He was an unmarried man, never had been married, when he united himself to Zulime, and the weight of testimony in the case is, that he did marry her in good faith. His conduct to his child from her birth to his death, his frequent declarations of his marriage to her mother, and of her legitimacy, and his avowal of it in his last will, are conclusive of his having married in good faith. The law applicable to such cases requires us to say so.

We have not thought it necessary to give all the evidence in this case in detail, but have accurately done so as to all of it bearing in any way upon the points in controversy, and especially as to that having any connection with the charge of adulterine bastardy. Those who may have any curiosity to read the testimony in full will find it in what is called the Probate Record; also in the cases as they are reported in 6 and 12 Howard, particularly in the old record of the last case.

Our judgment is, that by the law of Louisiana Mrs. Gaines is entitled to a legal filiation as the child of Daniel Clark and Marie Julia Carriere, begotten in lawful wedlock; that she was made by her father in his last will his universal legatee; and that the Civil Code of Louisiana, and the decisions and judgments given upon the same by the supreme court of that state, entitle her to her father's succession, subject to the payment of legacies mentioned in the record. We shall direct a mandate to be issued accordingly, with a reversal of the decree of the court below, and directing such a decree to be made by that court in the premises as it ought to have done. Thus, after a litigation of thirty years, has this court adjudicated the principles applicable to her rights in her father's estate. They are now finally settled.

When hereafter some distinguished American lawyer shall retire from his practice to write the history of his country's jurisprudence, this case will be registered by him as the most remarkable in the records of its courts.

TANEY, C. J., and JUSTICES CATRON and GRIER dissented.

TIRRELL v. BACON.

(Circuit Court for Massachusetts: 3 Federal Reporter, 62-66. 1880.)

STATEMENT OF FACTS.—The question raised in this case was whether a child adopted by A. under the laws of Massachusetts was a "child" in such sense

as to take under a devise by the will of A.'s own father, which gave to A. income for life and upon his decease the capital share or portion to A.'s "child or children then living."

§ 638. *Massachusetts law of adoption of children.*

Opinion by LOWELL, J.

The law of adoption of children in Massachusetts was first enacted in 1851, and modified a few years later in Gen. St., ch. 110. In 1871 it was modified in some respects. Under both those laws an adopted child was conclusively taken to be the equivalent of a legitimate child of the parent or parents who had adopted him, excepting in two particulars. *Sewall v. Roberts*, 115 Mass., 262; *Burrage v. Briggs*, 120 Mass., 103. The first statute had but one exception, and the law of 1871 added the other. The first was that such child should not take under a limitation to the heirs of the body of the adoptive parent; but this was held in *Sewall v. Roberts*, *ubi supra*, not to include a limitation to children. The other was, that he should not take by "representation;" and there is no pretense that Willie K. Tirrell claims by that title.

It is argued that the will expresses a general intent to favor those who were of the testator's blood, by its final limitation over to his heirs if his children's children should leave no issue. But the cases decide that an adopted child is a child, and is issue, and no general inferential intent can overrule the language. The argument was equally strong in one of the cases above cited. I cannot doubt that Willie K. Tirrell takes, by purchase, unless cut off by a later statute.

§ 639. *Construction of statute—Massachusetts act of 1876 respecting the adoption of children. How far retrospective.*

The statute of 1876, ch. 213, repeals the act of 1871, and changes the law of adoption very materially, with a view to limit the operation of the earlier statutes as construed by the supreme court. Section 9 declares that "the term child, or its equivalent, in any grant, trust, settlement, entail, devise, or bequest, shall be held to include any child adopted by the settler, grantor, or testator, unless the contrary clearly appears by the terms thereof;" but in all other cases the presumption should be against that construction; "*provided, however*, that nothing in this act shall be construed to restrict any right to the succession to property, which may have vested in any person already adopted in accordance with the laws of this commonwealth." When this law was passed Willie K. Tirrell had already been adopted, and the question is whether his rights are affected by it.

In Massachusetts the devise of a life estate, with a limitation over to the children of a person living at the death of the testator, gives all the children then living a vested remainder, which opens to let in after-born children. *Dingley v. Dingley*, 5 Mass., 535; *Weston v. Foster*, 7 Met., 297. In this case, the limitation being to those children of the life tenant who shall survive him, the interest of Willie K. Tirrell would be contingent on such survival; but it would be assignable by him if he were of age, and would, therefore, go to his assignees, if he should become bankrupt or insolvent, subject, of course, to the contingency. *Higden v. Williamson*, 3 P. Wms., 132; *Winslow v. Goodwin*, 7 Met., 363; *Gardner v. Hooper*, 3 Gray, 398; *Nash v. Nash*, 12 Allen, 345; *Belcher v. Burnett*, 126 Mass., 230, and cases cited. It was, therefore, a valuable interest which he owned in 1876.

The name which we may give to this interest of Willie K. Tirrell is not important, because, in my opinion, the proviso of the statute preserved all inter-

ests. It does not say that vested remainders shall be preserved, and contingent remainders destroyed; the word "vested" in the proviso qualifies "right" and not "property," and declares that a right of succession vested in any person at the date of the act shall not be restricted, not that property or estate which is vested shall not be taken away. The "vested rights" which it preserves are all existing rights. This is the meaning which that phrase bears in ordinary use in this country, though it has not acquired a technical meaning. It is not to be supposed that the law intended to destroy all contingent remainders and executory devises, and to preserve vested remainders alone. Such nicety of construction is not reasonable.

Were it not for this proviso a court would say, without hesitation, that the statute of 1876 was to be applied only to deeds and wills taking effect after its passage. This was taken for granted, and acted on, when the rule in Shelley's case was repealed. *Loring v. Eliot*, 16 Gray, 568. I doubt whether the proviso means more than that future settlements, though they should concern children already adopted, should be governed by it. Without it there might have been an argument, from the general scope of the act, that it had no application in any case to children who had been adopted before its date. If the legislature should undertake to pass a law construing deeds and wills already in operation, to the disadvantage of persons who had some existing interest or estate under them, it would be justly chargeable with attempting to exercise judicial powers, and the law would, in respect to such cases, be void. *Dunn v. Sargent*, 101 Mass., 336.

I therefore decide in favor of the defendant Willie K. Tirrell. The agreement provides that I should decree a conveyance to the person or persons whom I should find entitled; but I doubt whether, under the pleadings, I can properly make the decree in that form. Decree to be drawn in accordance with this opinion.

UNITED STATES v. GREEN.

(Circuit Court for Rhode Island: 3 Mason, 482-486. 1894.)

STATEMENT OF FACTS.—*Habeas corpus* by a father to obtain the custody and possession of his infant daughter. The defendant, who was the grandfather of the child, made return to the effect that the plaintiff became embarrassed, and brought the child and her mother to his house to reside; that the mother died there, and on her death-bed requested her parents to keep the child and bring her up as their own; that the infant continued to reside in his family, and was recently placed in a certain seminary to be educated; that he had called at the seminary on the day of the return, and learned that the child was not there; and "that neither at the coming of the writ to him, nor at any time since, has the said Elizabeth been, nor is she now, in his power, possession, custody or control."

Motion for an attachment on the ground of the insufficiency of the return.

§ 640. *Where the conscience of the court is not satisfied that all material facts are disclosed, it will not discharge the defendant upon his formal return.*

Opinion by STORER, J.

In cases of this nature the court will look into all the facts stated in the return, and ascertain if they contain a satisfactory statement upon which the party ought to be discharged. It will not discharge the defendant simply because he declares that the infant is not "in his power, possession, control or

custody," if the conscience of the court is not satisfied that all the material facts are fully disclosed. That would be to listen to mere forms against the claims of substantial justice, and the rights of personal liberty in the citizen. In ordinary cases, indeed, such a declaration is satisfactory, and ought to be decisive, because there is nothing before the court upon which it can ground a doubt of its entire verity, and that, in a real and legal sense, the import of the words "possession, power or custody" is fully understood and met by the party. The cases of *The King v. Winton*, 5 Term R., 89, and of *Samuel Stacey*, 10 John. R., 328, show with what jealousy courts watch the terms of returns of this nature. See, also, *Ex parte Eden*, 2 Maule & Sel., 226. In those cases there was enough on the face of the return to excite suspicions that more was behind, and that the party was really within the constructive control of the defendant. Upon examining the circumstances of this case I am not satisfied that the return contains all those facts within the knowledge of the defendant which are necessary to be brought before the court to enable it to decide whether he is entitled to a discharge, or, in other words, whether he has not now a power to produce the infant, and control those in whose custody she is.

§ 641. *Attachment is proper in case of contempt, but if the party is personally present, he may be ordered to answer interrogatories.*

There is no doubt that an attachment is the proper process to bring the defendant into court. But suppose he were here, the next step would be to require him to purge his supposed contempt, and to answer interrogatories. That is the very object of the present motion. But an attachment can be necessary only when the party is not present in court. The defendant is now personally present, and the court may directly make an order that he shall answer farther interrogatories to be drawn up at the bar. It is wholly unnecessary to go a circuitous route when there is a direct path open before us. I shall therefore make an order to this effect.

Order accordingly.

§ 642. *A father is not, as of course, entitled to the custody of his minor child, regardless of the child's best interest.*

Opinion by STORER, J.

As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for its interest to be under the nurture and care of his natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes. It will free it from all undue restraint and endeavor, as far as possible, to administer a conscientious, parental duty with reference to its welfare. It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody. The case of *The King v. De Manneville*, 5 East, 221, is not inconsistent with this doctrine; but on the other hand supposes its existence. The court there thought it for the interest of the child to give the custody to the father. The judges thought there was no reason to suppose the father

would abuse his right, or injure the child. Lord Eldon, in *De Manneville v. De Manneville*, 10 Ves., 52, avowed his approbation of the doctrine, and said he had, exercising the authority of the king, as *parens patriæ*, removed children from the custody of their father, when he thought such custody unsuitable. The case of *M. E. Waldron*, 13 Johns., 419, is directly in point; and to the same effect is *The King v. Smith*, 2 Strange, 982. See, also, *Rex v. Delaval*, 3 Burr., 1434; 3 Bac. Abr., *Habeas Corpus*, B., and Mr. Guillim's note. My judgment follows these cases without hesitation.

§ 643. **Legitimacy and illegitimate children.**—One who would dispute the heirship of a child under a marriage by asserting bigamy of the parent and a subsisting marriage has the burden of proof. In a civil suit a bigamist may be proved such by any of those facts from which marriage is inferable. Reputation of marriage is not enough, but facts from which it may be inferred are. Proof in a criminal prosecution for bigamy distinguished. *Patterson v. Gaines*,* 6 How., 550. See §§ 41-47.

§ 644. In questions of pedigree the evidence of a verdict in another suit may be admissible wherever reputation is admissible, although the person here affected was not a party to that suit. *Ibid.*

§ 645. In a question of pedigree involving legitimacy, the concurring testimony of witnesses that proposals of marriage were made, one of them testifying further that marriage took place in his presence, renders admissible declarations of the father, and his affectionate treatment of the child through life as corroborative. *Ibid.*

§ 646. Where marriage is proved, the presumption of legitimacy of a child born while it subsisted is not rebutted by the husband's declarations that it was illegitimate, unless proof of non-access of husband and wife is shown; access is presumed in such cases. *Ibid.*

§ 647. Where a daughter has been declared legitimate by her father in his last will, every presumption is in favor of her legitimacy. *Gaines v. New Orleans*, 6 Wall., 642.

§ 648. The presumption in favor of the legitimacy of a child born in wedlock may be removed by proof, beyond a reasonable doubt, of non-access; impossibility of access need not be shown. Rule applied where a child is born six months after marriage, the pregnancy not having been known by the husband when he married, and common reputation, and the treatment of the child by such husband and other circumstances going to repel the presumption of legitimacy. *Stegall v. Stegall*, 2 Marsh., 256.

§ 649. A verdict and final judgment determining the legitimacy of a son, though it estops him, does not estop any other children of the same father and mother, and such judgment is not competent evidence on the question of their legitimacy in a proceeding in which such other children are parties. *Kearney v. Denn*, 15 Wall., 51.

§ 650. Evidence of paternity in bastardy proceedings under Maryland act. Evidence of a likeness of the child to its supposed father is not admissible. *United States v. Collins*, 1 Cr. C. C., 592.

§ 651. The Maryland act of 1825 relating to illegitimate children enables them to inherit from the mother, and from each other, regardless of the legal capacity or incapacity of the parents to intermarry. *Brewer v. Blougher*, 14 Pet., 178.

§ 652. Under Virginia act of descents of 1785, section 19, the recognition of children by the parents must be after marriage to legitimate them. *Stevenson v. Sullivant*, 5 Wheat., 207.

§ 653. Illegitimate children acknowledged by the father after his marriage with their mother are legitimate. *United States v. Skam*,* 5 Cr. C. C., 367.

§ 654. A father's voluntary settlement made in favor of an illegitimate child, and without fraudulent intent, is good against subsequent creditors, if he was clearly solvent at the time of making it. *Anonymous*, 1 Wall. Jr., 107.

§ 655. A statute permitting bastards to inherit and transmit inheritances on the part of their mother does not enable one to inherit from his brother. *Stevenson v. Sullivant*, 5 Wheat., 260.

§ 656. As to Virginia bastardy act, see *United States v. Clements*, 3 Cr. C. C., 80; *United States v. Dick*, 2 Cr. C. C., 409; *United States v. Hancock*, 3 Cr. C. C., 81.

§ 657. That the circuit court of the United States has jurisdiction to require the father of a bastard to give security for its support, see *Ross v. Kingston*, 1 Cr. C. C., 140.

§ 658. **Child's rights and duties.**—The domicile of a minor is that of the father, and the custody and care of the estates and persons of minors belong to the courts of the father's domicile at the time of his death. *Powers v. Morte*,* 4 Am. L. Reg. (O. S.), 437.

§ 659. And where the father died in Louisiana, and his minor children were at the time in New York, where their uncle was appointed guardian, an application by such guardian to the court in Louisiana to vacate the appointment of a tutrix, and to transfer the property to New York, or make an allowance in money for the support and education of the children, was refused. *Ibid.*

§ 660. Under what circumstances and how the citizenship of an infant can be changed by act of her father, and for what purposes, jurisdictional or other. *Woolridge v. McKenna*, 8 Fed. R., 681.

§ 661. The circuit court of the United States has no jurisdiction, as against the state court, of a petition for a *habeas corpus*, in order to take a minor daughter from the mother's custody and deliver her to the father; and the fact that the petitioner is an alien does not vary this decision. *In re Barry*,* 5 Law Rep., 374.

§ 662. The law requires a father to maintain his minor children; but when the minor has separate estate, income may in general be used for his education and support, and a court of equity will allow the father a reasonable credit for such expenditure. *Holtzman v. Castleman*,* 2 MacArth., 555. And see *Bourne v. Maybin*, 3 Woods, 724 (§§ 801-18).

§ 663. The child follows the condition of the mother. If the mother is an Indian, the child is an Indian, though the father was a white man. *United States v. Sanders*, Hemp., 483.

§ 664. Parent's right to services, wages, etc.—A father may sue for loss of services occasioned by the beating of his minor child, although death may ensue as a consequence of the beating. *Plummer v. Webb*, 1 Ware, 75.

§ 665. But he cannot maintain the action if the services are due to another. *Ibid.*

§ 666. A father has a right of action for the abduction of his minor child, and for carrying him beyond the sea, notwithstanding the consent of the child, and even though the child was left mainly to support himself and was not an inmate of the father's family. *Steele v. Thacher*, 1 Ware, 91.

§ 667. But the father may forfeit his rights by turning the child out of his house, refusing to maintain him, and virtually abandoning him. *Ibid.*

§ 668. Where one's minor child is killed by negligence of a railroad company, which employs such child, the father may sue for loss of the child's services, and is not limited in the estimate of his damages to the period of the child's death. Law of master and servant on this point discussed. *Sullivan v. Union Pacific R. Co.*,* 9 West. Jur., 82.

§ 669. Action upon the case will lie for seduction of the plaintiff's daughter; and promise of marriage as the means of seduction may be shown. *Mudd v. Clements*, 3 Cr. C. C., 8.

§ 670. If a minor leaves his father's service and goes to a port where he ships as of full age for a whaling voyage, during which he perishes, the father cannot sue *per quod* unless the person shipping the son knew that he was a minor. *Cutting v. Seabury*, 1 Spr., 523; 23 Law Rep., 533.

§ 671. A father can recover damages for the employment of his son, without his consent, to go on a whaling voyage. *The Platina*, 3 Ware, 180.

§ 672. Where a master ships a minor who had run away from another vessel, under circumstances amounting to notice that the shipment was against the father's will, it is a tort for which the ship-owners are responsible in damages. *Sherwood v. Hall*, 3 Sumn., 128.

§ 673. Statute desertion by the minor who engages voluntarily for a voyage cannot be set up against the father's suit for his services; the engagement being without the father's knowledge. *Lovrein v. Thompson*, 1 Spr., 355.

§ 674. Where a minor, without his father's knowledge, conceals himself upon a vessel, and is not discovered until the vessel puts to sea, it is the master's duty, on reaching a port where the minor may be left with the American consul and sent home, to leave him. If he takes him on a voyage instead, the father may recover for the son's wages. *Luscom v. Osgood*, 1 Spr., 82.

§ 675. The father may be held responsible for the minor son's violation of an injunction against selling by way of infringement of a patent. *Dunks v. Gray*,* 3 Fed. R., 862.

§ 676. A father may sue in admiralty for the wages of his minor child; but not where he has renounced or forfeited this right; as by voluntarily allowing to the child the exclusive use of the fruits of his own industry, or by neglecting to perform those parental duties which are at the foundation of this right. *McGinnis v. The Grand Turk*,* 2 Pittsb. R., 326.

§ 677. In admiralty courts a minor is allowed to recover in his own name wages earned by him as a sailor, when the contract on which he sues was made with him personally, and it does not appear that he has any parent, guardian or tutor entitled to receive them. *The Schooner David Faust*, 1 Ben., 183.

§ 678. Where a father makes a contract by which his minor son is engaged for a whaling voyage, and the son deserts after he has attained his majority and before the end of the cruise,

the wages or share earned by the son up to his majority are not forfeited, but accrue to the father. *Coffin v. Shaw*, 8 Ware, 82.

§ 679. Where a minor not emancipated by his father has shipped for a whaling voyage, the suit for his wages or "lay" should be brought in his father's name. *Gifford v. Kollock*, 3 Ware, 45.

§ 680. In a libel for wages brought by father and next friend of a minor, offsets against the father himself cannot be allowed. Though the father may appropriate his son's wages, yet he may leave the earnings of the child to be sued for on the son's own libel. *The Lucy Anne*, 3 Ware, 253.

§ 681. The right of a father to the fruits of his minor child's labor has its foundation in his obligation to protect, nurture and educate the child. If he neglects these obligations and abandons his child, he forfeits his right to such earnings. But he cannot by his own act discharge himself of the duty to support. *The Etna*, 1 Ware, 462; *Steele v. Thacher*, 1 Ware, 91.

§ 682. A father, being entitled to the services of his children while they live with him, if they are by force or fraud withdrawn from his power or protection, has an action at common law *per quod servitium amisit*; and so in admiralty, a father may sue for the wages of his minor son, who is compelled against his will to perform a certain voyage. *Plummer v. Webb*, 4 Mason, 380.

§ 683. Father sending infant away from home assents to any contracts he may make. *United States v. Bainbridge*, 1 Mason, 71.

§ 684. An infant, after the death of his father, cannot recover wages earned during the life of the father, under a contract made by the father. *Roby v. Lyndall*, * 4 Cr. C. C., 351.

§ 685. Gifts between parent and child.—A deed from a daughter to her father is not *prima facie* void. *Jenkins v. Pye*, 12 Pet., 241; 4 Cr. C. C., 541.

§ 686. A conveyance made by a female child to her parent, just as she reaches full age, is not absolutely void; but such a transaction will be jealously regarded, and if unconscionable advantage was taken by the parent, or the act itself was unreasonable, equity will set the conveyance aside. *Taylor v. Taylor*, 8 How., 183.

§ 687. Where a father receives a large pecuniary benefit under a deed from a child recently of age, the conveyance is not *prima facie* void, but the attacking party has the burden of showing facts which should avoid it. An acquiescence of twenty years, and a subsequent and still existing insanity on the child's part, form a complete defense against the insane guardian's attempt to avoid the conveyance for undue influence. *Sullivan v. Sullivan*, * 11 Law Rep. (N. S.), 531.

§ 688. Where a daughter, immediately before marriage, conveyed to the father her real estate under a mistaken belief that it would benefit herself, and that she should have it immediately upon her father's decease, the operation being to deprive her of the estate, the conveyance was set aside in equity on her petition after her father's death, and account ordered of the proceeds of a portion thereof which had been sold. *Slocum v. Marshall*, 2 Wash., 397.

§ 689. A parent may make proper and suitable gifts to his children; if they are not so, they inure to the benefit of his creditors in bankruptcy; but if the gifts have been purchased in part by third persons, the assignee in bankruptcy can claim only the amount paid by the father. *In re Grant*, * 5 Law Rep., 11.

§ 690. A father made a comparatively trivial gift to his daughter at her marriage and afterwards became insolvent. *Held*, that the gift should be deemed a reasonable advancement to her, under the circumstances. *Hopkirk v. Randolph*, 2 Marsh., 132.

§ 691. For the construction of certain family settlements for the benefit of children, see *Rogers v. Law*, * 1 Black, 253; *Burton v. Smith*, 4 Wash., 522.

§ 692. A deed, purporting to have been executed in 1809, and recorded in 1835 by the order of the father to his infant son, under suspicious circumstances, considered. *Longworth v. Close*, 1 McL., 282.

§ 693. A gift unreasonably great from a parent to his child may be declared fraudulent as to the parent's creditors and set aside accordingly. *Hopkirk v. Randolph*, 2 Marsh., 132. The property of minor children, which has been accumulated by their sole exertions, with their father's consent, and has always stood in their name, does not vest in the assignee in bankruptcy of the father. *Tebbets, Ex parte*, * 5 Law Rep., 508.

§ 694. Miscellaneous points.—The act of parents in excess of their legal authority with regard to the estates of their children are likely to be performed *bona fide*, and deserve a more indulgent interpretation than those of mere strangers. *Carver v. Jackson*, * 4 Pet., 1.

§ 695. Under the Louisiana and Texas codes a father should not sell land belonging to his minor child without the assent of a judge granted upon the advice of a family council. *Hoyt v. Hammekin*, * 14 How., 346.

§ 696. Under the Civil Code of Louisiana, if a husband after his wife's death mortgages

community property for his debt, and afterwards dies while the son and heir is still a minor, but after the latter's emancipation, the son does not, by merely taking possession of the property and receiving rents and profits, render himself liable for the debt as universal heir of his father. *Gordon v. Gilfoil*, * 9 Otto, 168.

§ 697. A child *en ventre sa mère* does not until born possess any estate which can affect the power of the court to pass a decree directing a conversion of children's property. *Knotts v. Stearns*, * 1 Otto, 688.

III. GUARDIAN AND WARD.

SUMMARY — Appointment and removal of guardians, §§ 698-706, 708, 709. — *Guardians ad litem*, §§ 703, 707. — Management of ward's estate, §§ 710-717. — Sale of ward's lands, §§ 718-727. — Accountability of guardian to ward, §§ 711, 728-739.

§ 698. A Rhode Island statute provided that no guardian should be appointed unless all persons should have reasonable notice in writing, signed and served. *Held*, that a notice by merely reading did not serve the purpose and that the appointment was null. *Hart v. Gray*, §§ 740-41.

§ 699. Circumstances stated under which the appointment of a guardian for a minor may be impeached collaterally under the law of Minnesota. *Nettleton v. Mosier*, §§ 742-43.

§ 700. A guardian appointed without limitation of time by the orphans' court under the law of Maryland continues till the infant attains majority, and the infant at fourteen cannot choose another. In what cases an infant may at common law choose his own guardian at the age of fourteen. The different kinds of guardianship at common law stated. *Mauro v. Ritchie*, §§ 744-54.

§ 701. Maryland statutes concerning guardianships construed with reference to the appointment of guardians and the jurisdiction of the orphans' court. *Ibid*.

§ 702. A guardian cannot be removed without notice and citation to show cause. *Ibid*.

§ 703. Whether one may be appointed guardian, and also guardian *ad litem*. *Sprague v. Litherberry*, §§ 755-60. See § 860.

§ 704. A guardian may waive process and appear for his wards. *Ibid*.

§ 705. The proceedings of a court in appointing a guardian cannot be inquired into collaterally. *Ibid*.

§ 706. Absence of the infant from the county in which he was born, where his father and mother lived and died, and where his property was situated, does not oust the jurisdiction of the court. *Ibid*.

§ 707. A statute guardian cannot represent his ward in any suit wherein their interests differ, except by force of some statute; nor would he under such circumstances be appointed a guardian *ad litem*. *Mathewson v. Sprague*, §§ 761-63. See, also, §§ 860, 861.

§ 708. The state in which property is situated can appoint guardians for infant owners although they may be non-residents. *Hoyt v. Sprague*, §§ 764-76.

§ 709. Appointment of a guardian is not peculiarly an exercise of chancery powers. *Ibid*.

§ 710. The act of a legislature authorizing a guardian to make a particular investment of his ward's estate is not a judicial act, nor beyond the legislative powers. *Ibid*.

§ 711. Acquiescence by an infant for seven years after becoming *sui juris* precludes all complaint of irregularity in the management of his estate by his guardian. *Ibid*.

§ 712. Permitting his ward's estate to remain invested in a partnership is not necessarily a fraud on the guardian's part. *Ibid*.

§ 713. A guardian who lets his ward's property remain in a partnership has no lien on the property as against subsequent creditors. *Ibid*.

§ 714. A state legislature may pass special laws directing the investment or sale of the estates of infants and other persons not *sui juris*. *Ibid*.

§ 715. Rules of comity with reference to foreign guardians stated. *Ibid*.

§ 716. Circumstances stated under which the purchase of a guardian's property for the account and benefit of his wards is not fraudulent and void although he be insolvent. *Micou v. National Bank*, § 777.

§ 717. A deed signed "W., guardian of M.," is good when in execution of a chancery decree to convey. Maryland statute construed. *Van Ness v. Bank of the United States*, §§ 778-82.

§ 718. Language of a legislative act considered. The legislature may license a sale of an infant's land by special act. And where by such special act, being remedial, a use is specified, as for a pest-house, this is merely inducement to the legislature. *Ward v. New England Screw Co.*, §§ 788-85.

§ 719. Where a sale is made in pursuance of such legislative act, and the deed uses words descriptive of such a use, this is not conditional, and the sale is valid although the land was not used as intended. *Ibid*.

§ 720. The sale of a ward's land in Oregon need not be shown necessary; it is sufficient that it is beneficial. *Gager v. Henry*, §§ 786-97.

§ 721. Provisions in Oregon, as to notice of an application to sell the ward's land, considered. *Ibid.*

§ 722. The law in Oregon does not require that there should be a specific description of land in an application for its sale by a guardian. *Ibid.*

§ 723. In Oregon a petition for license to sell a ward's land is not an action *inter partes*, but in the nature of a proceeding *in rem*. *Ibid.*

§ 724. A proper petition by a guardian gives the court jurisdiction; its judgment for selling the ward's land cannot be questioned collaterally. *Ibid.*

§ 725. Conditions necessary to validate a guardian's sale of lands in Oregon considered, and irregularities which are cured by confirmation of the sale stated. *Ibid.*

§ 726. The time of the sale is primarily fixed by the notice, but may be postponed by the guardian, subject to the prescribed statute limits to its exercise. *Ibid.*

§ 727. Notwithstanding the general law of Louisiana making the father's guardianship of minor children import a tacit mortgage on his immovable property in their favor, the legislature may by special statute authorize the father to sell such property divested of such tacit mortgage where the proceeds are so preserved that the securities in the ward's favor are simply changed. *Lobrano v. Nelligan*, § 798.

§ 728. A ward must look to the estate of his guardian for debts due to him; he cannot demand rescission so as to compel a third person to repay what the guardian paid him. *Yerger v. Jones*, §§ 799, 800.

§ 729. In Mississippi a ward is not concluded by his guardian's intermediate accounts with the probate court. The final settlements of the guardian are open to examination, and do not conclude the ward until, after notice, they are approved by the court. *Bourne v. Maybin*, §§ 801-813.

§ 730. The claim of a ward against his guardian is a debt provable against a bankrupt guardian, and the relation of debtor and creditor arises when the guardianship ceases. *Ibid.*

§ 731. The fact that the guardian's accounts were in course of settlement in the probate court does not exclude the ward from proving her claim in the court of bankruptcy. A decree in favor of a ward against her guardian does not merge her claim against the estate of the bankrupt. *Ibid.*

§ 732. Rule stated of contribution between tenant by the curtesy and remainder-man, where the relation of father and child and of guardian and ward exists between them. *Ibid.*

§ 733. When a delinquent guardian is liable for interest. *Ibid.*

§ 734. That both guardian and ward were, during the war of 1861-65, within the Confederate lines, the court of the guardianship being in New York, is no reason why the guardian should not, after the war, account to the ward. War did not release the guardian from his obligations. *Micou v. Lamar*, §§ 814-20.

§ 735. Withdrawing the ward's funds from the United States, under apprehension of loss by confiscation, does not excuse the guardian from investing in proper securities and accounting for the fund. *Ibid.*

§ 736. A guardian is responsible on his original obligation, although entitled to credit for actual payments to a new guardian appointed in another jurisdiction. *Ibid.*

§ 737. What constitutes adjustment by a ward with his guardian and ratification of the guardian's acts. *Ibid.*

§ 738. Circumstances under which a guardian is chargeable with property of his ward in another state which he has not withdrawn. *Micou v. Lamar*, §§ 831-834.

§ 739. Liability of guardian for railroad bonds and coupons, and estimation of the value of such property, and rule as to allowing commissions and charging interest to the guardian. *Ibid.*

As to guardians *ad litem*, see §§ 914-930. And as to sales of infants' lands, see §§ 913-915.

[NOTES.—See §§ 825-851.]

HART v. GRAY.

(Circuit Court for Rhode Island: 3 Sumner, 339-343. 1888.

STATEMENT OF FACTS.—Plaintiff was put under the guardianship of defendant, on the ground of incompetency resulting from extreme old age. She brought this suit to recover \$480, alleged to have been received by defendant on her account, claiming that she had not been lawfully put under guardianship.

§ 740. *Courts of limited jurisdiction can exercise it only in cases and in the mode prescribed by the legislature.*

Opinion by STOEY, J.

The act of Rhode Island (Digest of 1822, p. 246, § 3) provides, "That no guardian shall be appointed or removed under this act, unless all persons interested shall have had reasonable notice in writing, signed by the clerk [of the probate court], and served by the town sergeant or constable, that he, she or they may appear to object to the same." This appointment is a special authority conferred on the court of probate (the town council), a court of limited jurisdiction; and, therefore, its jurisdiction can be rightfully exercised only in the cases and in the mode prescribed by the legislature. If the mode prescribed for the exercise of the authority is not complied with, the appointment is utterly void. Admitting that there might be an appeal to the superior tribunal in such a case, still, if the proceeding is a nullity in law, the exception to the jurisdiction and that nullity may be insisted on in an action like the present.

§ 741. *A notice served by reading it cannot be considered a notice in writing so as to make the appointment of the guardian effectual.*

The question is, therefore, reduced to the mere consideration whether the notice given in the present case was within the statute. The argument is, that a notice by reading of the order of the court by the officer is a notice in writing in the sense of the statute. I think otherwise. I understand that the notice must be a notice in writing; that the officer must leave with the party a written notice, an original from the clerk, or at least a certified copy in writing thereof. In no just sense can a notice by reading be deemed a notice by writing; and yet this is the extent of the argument. The legislature was wise in making such a provision; for the written notice might be important in assisting the party to make the proper defense or resistance to the petition. No instance, I believe, can be produced, where a notice, required to be served and given in writing, has been held valid, unless the service has been by the delivery of the paper itself or a copy in writing. It seems to me, therefore, that the guardian was not lawfully appointed; and that the decree of appointment is a mere nullity, and the plaintiff is entitled to recover.

I wish to throw out another suggestion for consideration. The ground of the petition is a supposed mental incapacity of the plaintiff. Now, under such circumstances, it seems to me that the court were bound to proceed with very great caution; and it would have been fit to have appointed some person, as a guardian *ad litem*, to represent the interests of the party, and to make a defense, before the decree appointing a general guardian was passed. What defense could a *non compos* make, without the assistance of some friend, under such circumstances? However, it is sufficient to say, that, for the reasons which I have stated, in which the district judge concurs, the appointment of the guardian was a mere nullity, and, therefore, the plaintiff is entitled to recover.

NETTLETON v. MOSIER.

(Circuit Court for Minnesota: 8 Federal Reporter, 387-391. 1880.)

Opinion by McCrory, J.

STATEMENT OF FACTS.—This is a suit in chancery, brought for the purpose of setting aside a guardian's deed. The following are the material facts. Section 1, ch. 59, Revised Statutes of Minnesota, provides as follows: "The

judge of probate in each county, when it appears to him necessary or convenient, may appoint guardians to minors and others, *being inhabitants or residents in the same county*, and also to such as reside out of the state and have any estate within the same."

The bill avers that application was made to the probate court of Goodhue county, Minnesota, for the appointment of a guardian for Agnes E. Wells, a minor, and that in the petition for such appointment it was "fraudulently and falsely stated that the said Agnes E. Wells resided in the county of Goodhue; that, in fact, she did not then and never did reside in said county, neither was she an inhabitant thereof," but was then and for many years thereafter a resident and inhabitant of the county of Rice, in the state of Minnesota. Upon said petition a guardian for said minor was appointed by the said probate court of Goodhue county, and by virtue of such appointment the guardian proceeded to sell and convey certain real estate of the said minor. The bill is filed to set aside this conveyance upon the ground that the appointment of the guardian was absolutely void, and also to remove the cloud from the complainant's title caused by the execution and recording of the guardian's deed.

§ 742. *Circumstances under which the appointment of a guardian for a minor may be impeached collaterally under the law of Minnesota.*

The demurrer raises the question whether the proceedings of the probate court, upon the petition for the appointment of a guardian for said minor, amount to an adjudication which cannot be attacked in a collateral proceeding. It is said that the probate court of Goodhue county had jurisdiction to entertain the application, and to decide the question of fact as to the residence of the minor, and that, having decided that question, and made the appointment, its judgment is conclusive upon the minor and all persons claiming under her. The petition, it is said, stated the necessary jurisdictional facts, and the probate court conclusively passed upon them when it made the appointment. The rule of law upon this subject is familiar. An erroneous act or judgment, by a court having jurisdiction of the subject-matter and of the parties, can be reviewed and corrected only by a tribunal having appellate jurisdiction. When brought in question collaterally or incidentally, it is to be regarded as conclusive upon all parties to it, as well as upon their privies. On the other hand, the act or judgment of a tribunal having no cognizance of the subject-matter is absolutely null and void, and may be impeached in any court, either directly or collaterally.

Within which definition does the present case fall? There is often great difficulty in drawing the precise line of distinction between such acts as are void and such as are voidable only; but the line exists, and we must locate it as best we can. Perhaps the safest guide in determining the question, so far as the present case is concerned, will be found in the opinion of Chief Justice Marshall in *Griffith v. Frazier*, 8 Cranch, 9. In that case it appeared that an administrator, duly appointed to administer an estate in South Carolina, had absented himself from that state, whereupon the ordinary having jurisdiction in such matters appointed another administrator. A judgment was obtained against the latter, upon which execution was issued, and a sale of real estate had. Everything was regular, except the appointment of the second administrator. The sale was attacked collaterally, and upon the ground that the second appointment was void. In delivering the opinion of the court Chief Justice Marshall stated the guiding principle in such cases as follows: "If

under any circumstances, the ordinary could grant administration during the absence of an executor who has made probate of the will, and legally competent to act, then he would have jurisdiction of the subject, and would judge of these circumstances; but if, in no possible state of things, he could grant such administration, it would be difficult to conceive how he can have jurisdiction." Page 26.

Most, if not all, the numerous cases in the books upon the subject will, upon examination, be found to harmonize with this general rule. The cases are very numerous in which it has been held that an adjudication, however erroneous, and even contrary to fact, cannot be collaterally attacked; but they are all cases in which the court had possession of the subject, and was, therefore, empowered to deal with and decide all questions arising. In such cases the court has power over the subject-matter, and that is jurisdiction. *Grignon v. Astor*, 2 How., 319 (Coursers, §§ 496-500). On the other side of the line was the case of *Shelton v. Tiffin*, 6 How., 163, where it was held that a party not served, and whose appearance was entered by an attorney without authority, is a nullity, and may be collaterally impeached. There was nothing in the record to show the want of jurisdiction, but the court held that the want of authority in the attorney might be shown by parol. It only remains to apply this doctrine to the case in hand. The statute is explicit in defining and limiting the power of the probate court. Each probate judge has power to appoint guardians — *First*, of minors being residents of the same county; *second*, of minors residing out of the state and having property in the county.

Can any circumstances be imagined under which a probate judge can appoint a guardian for a minor who neither resides in nor owns property in the county? Is not such an appointment the act of a tribunal having no power in the premises? The purpose of the legislature was to limit the jurisdiction of the probate court to the cases specified, and for obvious reasons. If one judge can make a valid appointment of a guardian for a minor residing in another county of the state, any other probate judge in the state may do the same. The result might be great confusion and conflict, and serious complications concerning titles. Besides, the law always guards carefully the rights of infants, and it is apparent that the strict enforcement of the statute is necessary to this end. I regard the statute, therefore, as not merely directory; it is imperative; and the residence of the minor within the county was, in the case under consideration, the fact upon the existence of which the power of appointment depended. It is not sufficient, in such a case, that the fact be alleged; it must exist. The power of the probate judge to appoint guardians is statutory, and limited to the county. *Weston v. Weston*, 14 Johns., 427; *Sherman v. Ballou*, 8 Cow., 304.

It is conceded that the appointment of an administrator of the estate of a person not dead would be void notwithstanding an allegation of his death. I think the appointment of a guardian for a minor whose person and estate are both beyond the jurisdiction of the court is equally void, notwithstanding the allegation that the minor is within the jurisdiction.

§ 743. *Questions of adequate remedy at law considered.*

The defendant further insists that if the guardian's appointment, and the sale and deed, are all void, the plaintiff has an adequate remedy at law in an action of ejectment, and therefore cannot resort to a court of equity for relief. This question did not receive much attention at the hearing, and I am not disposed at present to pass upon it.

Whether the bill presents a case in which a party not in possession has a right to resort to equity to remove a cloud upon title, or to cancel and set aside a void deed which has been placed on record, is an important question. Story's Eq. Jur., § 700, and cases cited in note *a* (11th ed.).

Counsel will be heard further upon this question at the next term.

MAURO v. RITCHIE.

(Circuit Court for the District of Columbia: 3 Cranch, C. C., 147-167. 1827.)

Opinion by CRANCH, J.

STATEMENT OF FACTS.—On the 13th of September, 1826, Joseph Forrest and Philip Mauro, by J. Marbury, "their attorney," applied to the orphans' court for leave to file their petition, praying that court to review its order granting to John T. Ritchie the guardianship of John W. Ott, to whom the petitioners had been appointed guardians in the year 1821; and that the said John T. Ritchie may be cited to answer the prayer of the petitioners. Whereupon that court ordered that leave be given as prayed, and that a citation be issued against the said Ritchie, returnable to the 20th of September, 1826.

The petition was accordingly filed, stating the appointment of the petitioners as joint guardians of John W. Ott; that they gave bond, etc.; that the said John W. Ott is still under age, being about fourteen years old, and still subject to their control and care; that on the 9th of August, 1825, John T. Ritchie ("who, your orators pray, may be made defendant to this bill of review") made application to be appointed guardian to the said orphan, and filed a letter from the said orphan, dated from Frederick city, in the state of Maryland, on the 14th of July, 1825, directed to the judge of the orphans' court of the county of Washington, in the District of Columbia, in which he represents himself to be fourteen years of age, and states that he chooses the said J. T. Ritchie as his guardian, and requests that he may be appointed. Whereupon the judge of the orphans' court, without notice to the petitioners, without having caused the orphan to be brought into court, and without further evidence, or other proceeding, by a decretal order appointed the said J. T. Ritchie guardian of the infant, which decretal order is signed and enrolled; that they are aggrieved thereby, and that it is erroneous, and ought to be reversed and annulled. And they assign for error:

1. Because the petitioners were appointed guardians under the act of 1798, ch. 101, c. 12, § 1, which gives the court power to appoint a guardian for an infant until the age of twenty-one, and that having exercised that power, by appointing the petitioners guardians of the infant till his age of twenty-one, it was not competent for the judge to remove the petitioners and appoint a new guardian except for cause shown, in the omission or neglect of duty, etc.; and if such neglect were alleged, the petitioners were entitled to be cited and heard.

2. Because the infant had no right, at the age of fourteen, to choose a guardian, having had guardians appointed until he should be twenty-one years of age.

3. Because the infant was not brought into court, and under the inspection and examination of the judge, that his age, competency to choose, and wish might be distinctly known to the judge.

4. Because the petitioners were not cited to show cause why they should not be removed, and the said Ritchie appointed guardian.

5. Because the petitioners had no notice of the application and appointment of the said Ritchie until after the said order was made, and had no opportunity to object to the same.

"For all which errors in the said decretal order your orators have brought this bill of review, and humbly conceive that they should be relieved therein. In tender consideration whereof, and for that there are divers errors and imperfections in the said decretal order and proceedings, by reason whereof the same ought to be reviewed and reversed, etc.; and to the end that the same may be reviewed and reversed, etc., and that the said J. T. Ritchie may answer, etc., and that your orators may be relieved according to equity and good conscience, may it please your honor to grant your orators a *subpœna* to the said J. T. Ritchie," etc., and they file a record of the proceedings referred to.

The said J. T. Ritchie appeared on the 20th of September, 1826, and prayed further time to answer, which was given to the 27th, when he appeared by Mr. Swann, his solicitor, and said, "that the bill of review, so as aforesaid exhibited against him, and the matter therein contained, are not sufficient in law to compel him to answer the said bill," etc., "wherefore for want of a sufficient bill in this case the said John prays that the said bill may be dismissed," etc. And the said Joseph and Philip, by J. Marbury, their attorney, say that the bill, etc., is sufficient in law, etc., etc.

The cause having been submitted to the judge of the orphans' court, without argument, he decreed that the prayer of the petition could not be granted, and that the petition be dismissed with costs. Upon which decree the petitioners appealed to this court.

The original order, appointing the petitioners guardians, was in these words:

"March 21, 1821. Catharine Ott having declined the appointment of guardian to the infant children of her son, the late Doctor John Ott, it is by the court this day ordered, that Joseph Forrest and Philip Mauro, both of said county and district, be appointed joint guardians of the said orphan children of Doctor John Ott, deceased, they entering into a bond of \$20,000 for each guardianship, with William Cooper and Hanson Gassaway securities."

On the 9th of August, 1825, John T. Ritchie made application to the court to be appointed guardian to John W. Ott, and filed the following letter:

"FREDERICK CITY, FREDERICK COUNTY, July 14, 1825.

"To the Honorable Mr. Lee, Judge of the Orphans' Court for Washington County, in the District of Columbia:

"HONORABLE SIR — I beg leave hereby to make known to you that I am the son of Doctor John Ott, late of Georgetown, in the District of Columbia, deceased, and am above the age of fourteen years, but under twenty-one; and I do choose for my guardian, my uncle, John T. Ritchie, of Georgetown aforesaid; and do hereby make application to you, sir, and request that you will be pleased to appoint him my guardian; that thereby he may possess and exercise the right of protection to myself and the property that has descended to me. With great respect, I remain your most obedient servant, JOHN W. OTT."

On the back of which letter was the following affidavit:

"MARYLAND, FREDERICK COUNTY, ss.

"On the 14th day of July, 1825, personally appears John W. Ott, son of Doctor John Ott, late of Georgetown, in the District of Columbia, deceased, the individual whose signature is attached to the within letter, before the subscriber, a justice of the peace in and for said county; and the said John W. Ott, being by me privately examined apart from and out of the hearing of all

persons whomsoever, declares that he had written the within letter for the purpose of having it delivered to the Honorable Judge Lee as thereby directed, with the view to procure the appointment of his uncle, John T. Ritchie, to be his guardian, and that he has not been induced to choose his said uncle to become his guardian by threat or ill usage of his said uncle, or of any other person, or through his or their displeasure. Witness my hand,

“GEORGE ROHR.”

It is noted on the record of the orphans' court that the court delivered an elaborate written opinion, concluding with a decree that the petition of Forrest and Mauro be dismissed with costs.

It appears from that opinion, the substance of which was published in the National Intelligencer of the 25th of December, 1826, that although the counsel of Mr. Ritchie objected to the court's opening the case upon this bill of review, yet the court did open it, and did reconsider and confirm its former decree; and the question whether that court had power thus to review its decree is to be considered as reserved for the appellate court.

The appeal from the original decree appointing Mr. Ritchie guardian was dismissed by this court at May term, 1826, because the transcript of the record was not transmitted within thirty days after the decree. It is now contended by the counsel of Mr. Ritchie that the present appeal is to the refusal of the orphans' court to review its former decree, and not to the decree which in effect affirmed its former decree; so that the only question now before this court, as they contend, is whether the orphans' court erred in refusing to reconsider its former decree. But the elaborate opinion of that court shows that it did review its former decree, and that it was because it found that decree to be correct that it passed the decree for dismissing the petition of Forrest and Mauro. The former decree was reviewed, and in fact affirmed.

Does the appeal from this last decree bring before this court the question whether the former decree was correct? If it does, and if this court should be of opinion that the first decree was erroneous, and that the orphans' court, upon the review or rehearing, ought to have reversed that decree, is it competent for this court to reverse it? If the orphans' court, in its discretion, had a right to review or rehear the cause, and did review or rehear it, we suppose no one will doubt the right of either party to appeal from the new decree made at the rehearing.

§ 744. *The orphans' court of Washington county, D. C., can review its decision although thirty days have elapsed.*

The first question, then, is whether the orphans' court had a right, circumstanced as the cause then was, to grant a rehearing or to review its decree. It is said that the proceedings of the orphans' court are analogous to those of a court of chancery, and that by the rules of that court a cause cannot be reheard after the decree has been enrolled; and that it is considered as enrolled after the expiration of the term in which the decree was rendered. To this it is answered that the orphans' court has no terms. It sits every day, or whenever the judge thinks proper. That its decrees are never in fact enrolled, and are only to be found in the paper minutes of the court. That the court is not bound by the rules of the chancery court, and if it were, yet in courts of chancery a rehearing is often had after the term in which the decree is pronounced, and is always within the discretion of the court, who will, and often have, set aside the enrollment for the purpose of letting in a party to a rehearing. 1 Har. Ch. Pr., 649; and to this effect were cited the cases of

Travis v. Waters, 1 Johns. Ch., 48, and *Consequa v. Fanning*, 3 Johns. Ch., 364. See, also, the case of *Mills v. Banks*, 3 P. Wms., 1, 8, where a cause was reheard after a lapse of eighteen years, and where the chancellor says that a rehearing is in the discretion of the court, and is not always a matter of right; and in one case, where the decree was not enrolled, the court refused to discharge an order for a rehearing, although at the distance of about twenty-four years.

§ 745. *Distinction between rehearing and review.*

The principle difference between a rehearing and a review is in this: that a rehearing may be had before enrollment of the decree; but after enrollment the party is put to his bill of review, which, if it be founded upon new matter of fact, discovered since the closing of the commission to examine witnesses, cannot be filed without leave granted upon petition; but if it be founded upon error in matter of law apparent upon the record, no such previous permission of the court is necessary. In the latter case "the constant method is to put in a plea, and demur, namely, a plea of the decree and a demurrer against opening the enrollment; and an answer is rarely required unless the same be ordered by the court; so that in effect a bill of review cannot be brought without leave of the court in some shape; for if it be founded upon matter apparent in the body of the decree, then, upon the plea and demurrer, the court judge whether there are any grounds for opening the enrollment; and if upon matter of fact newly discovered, the court, upon the petition for leave to file the bill, will judge whether there be any foundation for such leave. 1 Har. Ch. Pr., 170. The court, then, had a right to review its decree.

§ 746. *Petition for review analogous to a bill of review in equity.*

In the present case leave was granted "to file a petition praying the court to review its order in granting to John T. Ritchie the guardianship of John W. Ott." This petition was analogous to a bill of review in chancery, and points out the errors in law apparent upon the record for which it alleges that the decree ought to be reversed. It admits that the decree had been signed and enrolled, and prays that it may be reviewed and reversed. To this bill or petition the defendant, Mr. Ritchie, was cited to answer; and, having appeared, filed a general demurrer, to which there was a general replication and joinder. The decree of the orphans' court thereupon was, that the prayer of the petition cannot be granted, and that the petition be dismissed, with costs.

§ 747. *A judgment upon which an appeal lies from the orphans' court to the circuit court.*

This decree must be referred to the demurrer, and considered as a judgment in favor of the defendant, upon the issue of law joined by the parties; and cannot be considered as the mere exercise of the discretion of the court in refusing to review its decree, or to rehear the cause. That discretion was exercised, and perhaps expended in the order for leave to file the bill of review. The decree is, in effect, a judgment that the errors, suggested in the bill of review as apparent on the record, were not such as ought to have induced the orphans' court to reverse its decree appointing Mr. Ritchie guardian to John W. Ott. The parties had, by the demurrer and joinder, submitted to the court a matter of law (of right), not of discretion. The court decided the matter of right, and the parties aggrieved by the decree have appealed to this court. The question, then, upon this appeal, is whether that matter of law (or right), thus put in issue by the parties, has been correctly decided by the orphans' court.

The bill of review states five grounds of error: 1. That the petitioners, Forrest and Mauro, had, by a previous order of the court, been appointed guardians of John W. Ott, by virtue of the first section of the twelfth chapter of the act of 1798, c. 101, and that it was not competent for the court to remove them, except for cause shown, in the omission or neglect of some duty; nor without being cited and heard. 2. That the orphan, having had a guardian appointed for him until the age of twenty-one, had no right, at the age of fourteen, to choose a guardian. 3. That he was not brought into court to choose his guardian. 4. That the petitioners were not cited to show cause why they should not be removed; and 5. That they had no notice of the application and appointment of Mr. Ritchie until after he was appointed.

§ 748. *A guardian appointed without limitation of time by the orphans' court, under the law of Maryland continues till the infant attains majority.*

1. By the first section of the twelfth chapter of the act of 1798, c. 101, it is enacted, "that whenever land shall descend, or be devised to a male under the age of twenty-one years, or to a female under sixteen," "and the said male or female shall not have a natural guardian, or guardian appointed by last will, agreeably to the statute in that case made and provided" (12 Car. 2, c. 24), "the orphans' court shall have power to appoint a guardian to such infant until the age of twenty-one years, if a male, and until the age of sixteen, if a female, or marriage." Under this clause of the statute, the petitioners Forrest and Mauro were, in 1821, appointed joint guardians of the infant children of Dr. Ott.

As the court had power to appoint them guardians until the full age of the infants, and as they were appointed generally, without limitation of time, their authority continues until the infants respectively attain that age, unless it be lawfully revoked by the court. The orphans' court has no express power, under the statute, to remove a guardian, or to revoke the appointment, except in the single case of his refusing to give security when required; and by the twentieth section of the fifteenth chapter of the act of 1798, c. 101, it is enacted, "That the orphans' court shall not, under any pretext of incidental power or constructive authority, exercise any jurisdiction whatever not expressly given by that act, or some other law." If it claim jurisdiction to remove a guardian for any other cause, it must claim it as a jurisdiction incidental to the power of appointment. But all incidental jurisdiction is expressly forbidden by the statute. The orphans' court, therefore, had no power to remove the guardians, or to revoke their authority, they never having refused to give the security required.

§ 749. *When, at common law, an infant may choose his own guardian at the age of fourteen.*

2. But it has been contended that an infant has a common law privilege of choosing a guardian at the age of fourteen, and that this privilege has been "sanctioned by the uniform usage, in England and this country, of a thousand years;" that it is "a solemn, immemorial right;" and that the statute, when it authorized the court to appoint a guardian until the infant should attain the age of twenty-one years, meant to say, "unless the orphan, after he shall arrive to the age of fourteen years, shall object to such appointment, and ask permission to choose another guardian."

But it was not contended that this was an absolute right to choose a guardian; but a right to be exercised under the "surveillance" of the court; for it was admitted that the court would not appoint the person nominated by the

orphan if he "were *non compos*, convicted of an infamous crime, or notoriously dissolute and immoral; nor unless he gave ample security for the faithful discharge of his trust." The statute does not in the slightest manner recognize or allude to the right of the infant to choose his guardian; but by giving the court an absolute power to appoint a guardian till twenty-one, evidently negatives the idea of any such right; for such a right is inconsistent with the power given to the court. But it seems to have been taken for granted that, by the common law, the infant had a right to choose his guardian in all cases. This is not true. When there was a guardian in chivalry, or by nature, or by statute, the infant had no right to choose. It was only when there was a guardian in socage, or for nurture, in which cases the guardianship continued only till the age of fourteen, that the infant's right of election existed.

§ 750. *The different kinds of guardianship at common law.*

By the law of England there are various kind of guardians.

1, Guardian in chivalry; 2, in socage; 3, by nature; 4, for nurture (these four were by the common law); 5, by the statute of 4 and 5 Phil. and Mary, c. 8, and 12 Car. 2, c. 24, § 8, by which statutes the father has a right, by deed or last will, to dispose of the custody of his infant children until their age of twenty-one, or for a less time, and these are called "testamentary," and sometimes "statutory" guardians; 6, guardians by the custom of particular manors, cities, etc.; 7, guardians appointed by the lord chancellor, exercising, in this respect, the royal prerogative of *parens patriæ*; 8, guardians appointed by the ecclesiastical courts; 9, guardians *ad litem*, appointed by any court in which the interests of an infant are litigated. 3 Bl. Com., 426; Harg. Co. Lit., 88b, note 16. These are, in general, only appointed *pro hac vice*, and continue only until such interest is finally disposed of by the court. 10, guardians by election.

1. Guardian in chivalry existed only when the infant inherited lands holden by knight's service. This guardian had the custody of the person and lands of the infant until his full age of twenty-one, and took the profits to his own use without account; and also the value of the marriage of his ward. The infant had no right to elect a guardian. This tenure was abolished by the statute 12 Car. 2, c. 24, and with the tenure went the right of guardianship connected with that tenure.

2. Guardianship in socage arose, like that in chivalry, wholly out of tenure. It was necessary that the ward should have inherited lands holden in socage. It continued only until the heir attained the age of fourteen, although some have said that it continued until the age of twenty-one, unless the ward, after his age of fourteen, should have elected another guardian. The *King v. Pier-son*, Andrews, 313; Lit., § 123; *Byrne v. Van Hoesen*, 5 Johns., 67. The guardian in socage had the custody of the person and of the lands; but wholly for the benefit of the ward. The guardian in socage must be the next of kin, to whom the lands of the infant cannot by any possibility descend.

3. Guardianship by nature existed only where the ward was heir apparent of the guardian, and extended only to the person of the ward. The father was always guardian by nature of the person of his heir apparent, even when the infant inherited lands holden by knight's service, and where the lord was guardian of the estate. Guardianship by nature continued until the full age of twenty-one; and the infant had no right to elect a guardian. This guardianship did not extend to the younger children who were not heirs apparent.

Guardian by nature has no right to the custody of the infant's estate. H. St. G. Tucker's notes on 1 Bl. Com., 461.

4. Guardianship for nurture extended only to the custody of the persons of those infants who were not heirs apparent, and continued only until their age of fourteen years, and none could have it but the father or mother. It only occurs where the infant is without any other guardian. After fourteen the infant is at liberty to choose his guardian. How this election is to be made, at common law, does not appear in any book that we have consulted.

The court of chancery, exercising, in regard to infants, the prerogative of the king as *parens patriæ*, will appoint guardians whenever such appointment is necessary for the purpose of protecting the infant's general interest, or for the purpose of sustaining a suit, or of consenting to the marriage of the infant. *Ex parte Woolscombe*, 1 Mad., 213. But it could never have been required, by the common law, that all the infants in the kingdom who had not guardians provided by the common law should be brought into the court of chancery to obtain them.

The ecclesiastical courts have claimed a right to appoint curators or guardians as to legacies and distributive shares of the personal estates of intestates, and this right has been admitted by the common law courts; but their right to meddle with the persons of infants has been denied both by chancellors and by common law judges. 4 Burn's Eccles. Law, 88, 91; *Banes v. Lowder*, 3 Keb., 834; *Bishop of Carlisle v. Wells*, 3 Jones, 90; S. C., 2 Lev., 162; *Buck v. Draper*, 3 Atk., 631; *Rex v. Delaval*, 3 Burr., 1436. There is a *dictum* of Lord Chancellor Hardwicke in 2 Vez., 375, that "supposing there was no testamentary guardian, nor a mother, if the infant has any socage land, and is of the age of twelve, if female, or of fourteen, if male, they are allowed to choose their guardian; as is frequently done on the circuit, and is the constant practice, and what this court frequently calls on infants to do; though this is sti'll liable to any reasonable objection made to such choice."

Mr. Hargrave, in note 16 to Co. Lit., 88b, understands the expression "on circuit" to mean before a judge on the circuit. We have not found this practice alluded to in any other book, unless it be in Style, 456; but it is so explicitly stated by Lord Hardwicke that we must take it to be so; and it is probable that the appearance of the infant, and his choice with the approbation of the court, were entered upon the minutes of the court, and constituted the only evidence of the title of the guardian thus chosen. This practice is, by Lord Hardwicke, confined to the case where the infant has socage land; and probably to the case where there had been a guardian in socage, which could only be where the infant took by descent. A person cannot strictly be said to have land unless he has a freehold estate; for none but a freeholder can be tenant to the *precipe*, or be the owner of real estate. Where an infant had land by purchase, and not by descent, or where he had only personal property, it does not appear that a guardian could be elected or appointed before a judge on the circuit.

The right of the ecclesiastical courts to appoint a curator or guardian for the personal estate is probably no more than the right of every court to appoint a guardian *ad litem* (3 Salk., 177, pl. 14; 3 Burr., 1436), for those courts, having jurisdiction as to wills and legacies, and the ordering of distribution of intestate estates, all legatees, and persons entitled to distributive portions of intestate estates, were parties before them; and if any of those parties were

infants, those courts, as every other court, would have had a right to appoint guardians *ad litem* to protect their interests, so long as they were pending before those courts, and to receive and apply the money or other property which they should receive under the orders of such courts, who would have a right also to take security from such guardians for the faithful execution of their trust. This is probably the only foundation of the power of the ecclesiastical courts to appoint guardians; and it will not support a claim to appoint a guardian for the person of the infant (*Lowry v. Reynes*, 2 Lev., 217), or for his personal estate acquired in any other way than by bequest, or in the course of distribution. In the case of guardian for nurture it does not appear in what manner, or before whom, the infant, when he attained the age of fourteen, was to make his election; it is probable, however, that it was to be made as in the case of tenure by socage. Nor does it appear that an infant, by the law of England, had a right to choose a guardian in any case where a guardian had been appointed for him by any person having a discretion to choose, unless such appointment were expressly limited to the time of the infant's attaining the age of fourteen, which it is believed, in analogy to the rule of the common law in guardianship in socage and for nurture, was generally the case in appointments by the court of chancery, and by the ecclesiastical courts; after which age of fourteen they were generally permitted to nominate their guardians, and if the courts perceived no material objection, they appointed the guardians thus nominated. Andr., 313; 2 Lev., 217.

After the statute of 12 Car. 2, c. 24, which abolished tenures by knight's service, almost all the tenures became tenures in socage, and, consequently, almost all guardianships as to lands fell upon persons not personally chosen by anybody. It was right that these accidental guardianships should be removable at the age of discretion of the infant; but the same reason did not apply to guardians selected by any authority competent to choose persons well qualified to take care of the interest of the infant. Hence the statute of 12 Car. 2, c. 24, § 8, authorized the father to appoint a guardian to his child until the age of twenty-one, without recognizing any right in the child to choose a guardian. This provision, Mr. Justice Blackstone seems to think, was made in consideration of the imbecility of judgment in children of the age of fourteen.

Of the four kinds of guardianship at common law, it is believed that only one exists in this country, namely, guardianship by nature. Tenancy by knight's service, and, consequently, guardianship in chivalry, never existed here, as the lands were, by charter, to be holden in free and common socage. Guardianship in socage cannot, since the Maryland statute of descents, 1786, c. 45, exist here, because there cannot be found any of kin to the infant, who may not by possibility inherit the land. Guardianship for nurture cannot exist here, because it is applicable only to such children as are not heirs apparent; and here all are, by that statute, heirs apparent, and, consequently, guardianship by nature exists in this country, and applies to all the children.

But a guardian by nature, at the common law, has no authority over the lands of the infant, and, perhaps, not over his personal estate; as it has been decided, both in England and in some of these states, that he has no right to receive a legacy bequeathed to his ward. See *Harg. Co. Lit.*, 88 b., and note 12; *Genet v. Tallmadge*, 1 Johns. Ch., 3; *Anderson v. Derby*, 1 Nott & McC., 369; *May v. Calder*, 2 Mass., 59; *Strickland v. Hudson*, 3 Ch. Rep., 168; *Dagley v. Tolferry*, 1 P. Wms., 285; *Eq. Cas. Ab.*, 300, pl. 2; *Gilb. Eq. Cas.*, 103; *Phillips v. Pagel*, 2 Atk., 80; *Cooper v. Thornton*, 3 Bro. C. C., 96, 186; *Cun-*

ningham v. Harris, cited by the master of the rolls, in Cooper v. Thornton; Tucker's notes to 1 Bl. Com., 462; 1 Vern., 295; 1 Johns. Cas., 217.

5. Statutory guardianship. The statute of 4 and 5 Phil. and Mary, c. 8, which, by implication, gave the father a right to appoint a guardian, by deed or will, to his daughters until the age of sixteen, and upon the death of the father, without such appointment, gave the custody of the daughters to the mother; and the statute of 12 Car. 2, c. 24, § 8, which authorized the father to appoint, by deed or will, a guardian for his infant children until their full age, were in force in Maryland; and the latter is expressly recognized and referred to in the testamentary system of Maryland of 1798, chs. 12, 101, § 1. These statutes are now in force in this county and such guardians may now be appointed by the father.

6. Guardians by custom are unknown in this country.

7. Guardians by appointment of the chancellor. The chancellor in Maryland, it is believed, never had the power of appointing guardians, except *ad litem*.

8. Guardians by appointment of the ecclesiastical courts. No such courts exist in this country.

The judge, or commissary-general, or deputy-commissaries, who exercised in Maryland the only remnant of ecclesiastical jurisdiction transferred to this country, had no such power. It was, by the Maryland act of 1715, c. 39, vested solely in the commissioners of the county courts, that is, the justices of the county courts.

9. Guardianship *ad litem*. All the courts had power to appoint guardians *ad litem*, to protect the interests of infants in their respective courts.

10. Guardianship by election, as mentioned by some of the English writers, has never been recognized in this county. Hargrave, in his note 16 to Co. Lit., 88 b, says: "The right of making such an election arises only when, from a defect of the law, the infant finds himself wholly unprovided with a guardian."

Lord Coke, in Co. Lit., 87 b, says: "If a man be seized of a rent-charge, rent-seck, common of pasture, and such like inheritances which do not lie in tenure, and dieth,—his heir within the age of fourteen years,—in this case the heir may choose his guardian; but if he be of such tender years as he can make no choice, then (if the father hath made no disposition of the custody of the child) it were most fit that the next of kin, to whom the inheritance cannot descend, should have the custody of him. And whosoever taketh the rent, etc., the heir shall charge him in an account. But if he hold any land in socage, in that case the guardian in socage shall take into his custody as well the rent-charge, etc., as the land holden in socage, because he hath the custody of the heir." This is a case in which Lord Coke supposes that the heir may choose his guardian before the age of fourteen.

Mr. Hargrave remarks upon it, that "Lord Coke only takes notice of such an election where the infant is under fourteen; and, as to this, omits to state how, and before whom, it should be made. Nor have we yet met with any prior or cotemporary writer who supplies the defect. As to a guardian after fourteen, it appears, from the ending of guardianship in socage at that age, as if the common law deemed a guardian afterwards unnecessary. However, since the 12 Car. 2, enabling a father to appoint a guardian to his children till twenty-one, it has been usual, for want of such a guardian, to allow the infant to elect one for himself." "Such election is said to be frequently made

before a judge on the circuit. 2 Ves., 375. But we do not think this form to be essential. The last Lord Baltimore, when he was turned of eighteen, having no testamentary guardian, and being under the necessity of having one for some special purposes, relative to his proprietary government of Maryland, named a guardian by deed." "Indeed, it seems as if there was no prescribed form of an infant's electing a guardian after fourteen any more than there is before; and, therefore, election by parol might, perhaps, be sufficient, though it would be wrong to trust to a mode so unsolemn. But we do not wonder at the deficiency, because guardianship by election of the infant is of very late origin; it being, we believe, not only unnoticed by any writer before Lord Coke, except Swinburn, but there still being no cases in print to explain the powers incident to it, or whether an infant may change a guardian so constituted by himself. Even Lord Coke, we see, though professing to enumerate the different sorts of guardianship, and though he had before mentioned the latter one, omits it here." Co. Lit., 88 b. "Whence it may probably be conjectured that, in his time, it was, in strictness, scarcely recognized as legal."

What Swinburn says in part 3, § 11, respecting the right of the infant to choose his tutor, applies only to the custom of the province of York. *Buck v. Draper*, 3 Atk., 361. Thus we see that the right of infants, at the age of fourteen, to choose their guardians, is not universal, nor has been "of a thousand years' standing."

§ 751. *Maryland statute of 1715 and other later statutes concerning guardianship.*

By the law of Maryland, 1715, c. 39, § 7, "If any part thereof," that is, of the intestate's estate, "belong to an orphan who is capable of choosing his guardian, such orphan shall be called to court" (the county court), "and shall then and there choose his guardian, into whose hands the said orphan's estate shall be committed; but if such orphan be not at age, then the justice aforesaid" (of the county court) "shall put the persons, lands, goods and chattels of the orphans into the hands of such person or persons as they shall think fit, and take a bond, with two sufficient sureties, in the names of the orphans themselves, for the securing and delivering the said estate to said orphans or their guardians when thereunto lawfully called."

The persons thus appointed, before the orphan is of age to choose his guardian, are, by the act, called trustees. It is not expressly said in the act how long these trustees shall exercise the rights of guardianship; but from their being bound to deliver up the property to the orphans themselves it is evident that the guardianship was to continue, or might continue, until the orphans should be of full age and capable of receiving the possession of their estates; and by the provision being in the alternative, namely, to deliver up the estates to the orphans or to their guardians, it is equally evident that guardians might be afterwards appointed; but as the county court had power, upon the trustees' refusal to give new security when required, "to remove the orphans' estates out of their hands" (1715, c. 39, § 20), "and to remove the person and estate of such orphan into other hands" (1729, c. 24, § 6), it does not necessarily follow that the trustees so appointed were to be removed of course, upon the infant's attaining the age of fourteen; nor that the infant, after such appointment, had a right, at the age of fourteen, to choose his guardian; for the obligation of the trustees to deliver up the estate to the guardian when required might be only an obligation to deliver it to the person into whose hands the court should order it to be removed in the cases referred to in the twentieth

section of the act of 1715, c. 39, and sixth section of the act of 1729, c. 24.

This idea is corroborated by the thirty-third section of 1715, c. 39, by which, if a guardian should commit waste and should fail to give security as the court should require, to answer to the orphan for the waste, when at age the orphan (if at age to choose his guardian) should elect his guardian; but if not of age to make such election, the court should appoint such other person as they should think meet; and the guardian so elected, and the other person so appointed, were to hold and enjoy the land and plantations until the orphan should "come to age." By this section the persons appointed by the court, while the orphan was under fourteen years of age, were required to hold the estate granted until the full age of the infant; therefore, taking together the seventh, twentieth and thirty-third sections of the act of 1715, with the sixth section of the act of 1729, and the act of 1763, c. 24, it seems to us that the right of the infant to elect a guardian, which is clearly recognized by those acts, is confined to the case where the infant is without a guardian or trustee already appointed by the court, or by the father, under the statutes of the 4 and 5 Phil. and Mary, c. 8, or the 12 Car. 2, c. 24.

By the act of 1763, c. 24, the court was authorized, on application, to permit an orphan of fourteen years of age to choose his guardian; and if under fourteen, the court was to appoint the guardian, even before the distributive share of the orphan was certified by the commissary to the county court; and the guardian so appointed was to have the same power as a guardian otherwise appointed, viz., to hold the estate until the full age of the orphan. The act of Maryland of 1777, c. 8, by which the orphans' court was erected, gives to that court all the powers before vested in the county courts or in the commissary-general, in relation to guardians and testamentary affairs. Thus the law stood until the legislature revised the several acts upon the subject and adopted the system reported by the chancellor of Maryland in 1798, c. 101.

In the previous acts nothing was said of guardians by nature, or natural guardians, or testamentary guardians, except that the latter are excluded from the operation of the thirtieth section of the act of 1715, which requires the guardian to ascertain the annual value of the real estate, etc.; the words are, "other" (orphans) "than such whom the testator in his life-time, by his last will or testament, hath otherwise ordered and disposed of." But those acts only provide for the case of orphan infants; that is, fatherless infants. The legislature seems to have supposed that the father, as guardian by nature, had the custody and care of the real and personal estate as well as of the person of his child; and does not seem to have considered the mother of an orphan as his guardian by nature after the death of the father.

This was not so at the common law. By that law the guardian by nature had only the custody of the person of his heir apparent; and, after the death of the father, the mother, if living, was guardian by nature to her heir apparent. The grandfather was also guardian by nature to his grandson, if he was his heir apparent. So the grandmother, the uncle, the aunt, etc., would each be guardian by nature to his or her heir apparent; and yet the old acts of Maryland, in all such cases, authorized the county courts to appoint guardians, although there were already, by the common law, guardians by nature whose authority over the person of the infant continued until he arrived at the age of twenty-one years.

Those acts, and especially the act of 1715, having provided for a guardian

in every case, except the case of an infant whose father was living, ought to be construed as having virtually declared that the father, as guardian by nature, should have the custody and care of the real and personal estate of the infant, as well as of his person. But the acts did not give the courts authority to require surety from the father, as natural guardian, unless that authority were given by the twentieth section of the act of 1715, which enacts, "That the justices of the county courts take able and sufficient security for orphans' estates, and inquire yearly of the security; and if there be just cause, that they require new and better security; and upon refusal to give new and better security, that they remove the orphans' estates out of their hands." This section was not deemed sufficiently explicit to enable the county court to demand security from guardians, chosen by infants of fourteen years; and to remedy this defect, an act was passed in 1752, c. 3, expressly for the purpose of enabling the court to require security from such guardians; but that act did not apply to guardians by nature. If the twentieth section of the act of 1715 did not, by its general terms, include guardians chosen by infants, it could not include natural guardians nor testamentary guardians. Indeed, if testamentary guardians had not been expressly recognized in the thirtieth section of the act of 1715, it would be difficult to maintain that the general words, in which the seventh section gives the power of appointment to the county court, would not be justly construed as repealing the statutes of 4 and 5 Phil. and Mary, c. 8, and 12 Car. 2, c. 24, so far as they might have been supposed to operate in Maryland. But it is believed that those statutes have always been considered as in force in Maryland, so far as to authorize a father to appoint, by his will, a guardian for his infant children.

§ 752. *Powers of the orphans' court to appoint guardians.*

Again, the seventh section of the act of 1715, c. 39, by giving power to the court to appoint a guardian for every orphan who is entitled to a distributive share, superseded, in all such cases, the common law right of guardianship by nature, except in the case of the father; so that neither the mother, nor the grandfather, nor the uncle, could, in such cases, be guardians by nature, in Maryland. From whence it follows, that after the statute of descents, 1786, c. 45, and before 1798, in Maryland, there were only three kinds of guardians, viz.: 1. Testamentary guardians under the statute of 4 and 5 Phil. and Mary, c. 8, and 12 Car. 2, c. 24. 2. Natural guardians. 3. Statutory guardian, viz.: guardian appointed by the county court under the statute of 1715, and by the orphans' court under the statute of 1777, c. 8.

For although the orphan, at the age of fourteen, had a right to choose a guardian, the appointment was still to be made by the court; and although the persons appointed by the court, when the orphan was under the age of fourteen, were called trustees, yet they were, in fact, guardians, and had all the rights and were subject to all the duties of guardians; they are, indeed, sometimes called guardians in the same act of 1715. The infant, if no guardian had been appointed for him, and if his father were not alive, when he arrived at the age of fourteen had a right to choose his guardian in court; but if a testamentary guardian had been appointed, or if the court had appointed a guardian for him before his age of fourteen, or if his father were living, he had no right to choose his guardian. If this be the true construction of the law of Maryland previous to 1798, the provisions of the act of that year, c. 101, will be perfectly intelligible.

The act of 1798 c. 101, ch. 12 does not, like the act of 1715, confine the

power of the court to the case of orphans entitled to a distributive share of an intestate personal estate, but extends it to all infants to whom lands shall descend, or be devised, or who may be entitled to a legacy, or to a distributive share of the personal estate of an intestate, if the infant have no natural or testamentary guardian. By "natural guardian," in this statute, must be intended such a natural guardian as is entitled to the guardianship of the estate as well as of the person of the infant. At common law, there was no such natural guardian; the guardian by nature, under that law, being only entitled to the custody of the person of his heir apparent. The previous law of Maryland recognized only one natural guardian entitled to the guardianship of the estate of the infant; and that was the father.

If, then, the infant have no father, nor testamentary guardian, the orphans' court has the right of appointing the guardian. The act of 1798 does not in any manner recognize the right of the infant to choose his guardian at any age. On the contrary, the orphans' court is authorized, in all cases in which it may appoint a guardian, to make the appointment until the full age of the infant. This power is directly repugnant to those parts of the former acts of Maryland which authorize the infant to choose his guardian, and consequently repeals them. Guardianship in socage, and guardianship for nurture, which were the only two cases in which the infant had, by the common law, a right to choose his guardian, seem to have been virtually abolished by the act of 1765, c. 39, which gave the power to the county courts to appoint guardians to all orphans entitled to a distributive share. The right of election which they afterwards had depended upon the statutes which were repealed by that of 1798, c. 101.

The case of an orphan who has acquired property by deed of gift, or by purchase other than devise, is not provided for by that statute. There is no court competent to appoint a guardian for him, nor do we think he can constitute one by his own act. Indeed we think he has not in any case a right to choose his guardian. And it was not without reason that the legislature thought proper to transfer the right of election from the infant to the orphans' court. At the age of fourteen the infant begins to be restless and ungovernable, and the salutary restraints of the guardian are irksome. The infant is apt to think his guardian penurious and tyrannical. He wants greater indulgences; and there are always artful and insinuating men enough who are eager to grasp all the property they can lay hold off; and who, taking advantage of these dispositions in the infant, will stimulate his restlessness, excite his suspicions, undermine the authority of the guardian, and finally prevail on the infant, in his simplicity, to place his property in their hands. The chance of evil resulting from the infant's right of election seems greater than the chance of good; and the choice of the court is more likely to be judicious than that of the infant.

§ 753. *The infant should be personally brought into court to choose his guardian, if within the jurisdiction.*

The third error assigned is that the infant was not brought into court to choose his guardian. This appears to us also to be a fatal error; especially as the infant was not out of the jurisdiction of the court at the time. In the case of *Lloyd v. Carew*, in 1699, 1 Eq. Ca. Ab., 260, pl. 2, it is said that "if a person appointed a guardian pursuant to the statute 12 Car. 2, c. 24, dies, or refuses to take upon himself the guardianship, my lord chancellor may appoint a guardian; but a guardian cannot otherwise be appointed than by

bringing the infant into court, or his praying a commission to have a guardian assigned him." 2 Fonb., B. 2, part 2, ch. 2, § 2, p. 236.

In an anonymous case in the upper bench in 1655, "The court was moved in behalf of an infant to discharge a guardian assigned by the court, with an intent to make Richard Somers, attorney of this court, guardian in his room, and that the former inspection may be discharged, and that the infant may now be inspected again, because when the former inspection was, and the guardian assigned, there was no action depending in court against the infant. Glyn, C. J.: Let it be so for the cause you have alleged, and give notice of it to the former guardian." Style, 456.

1 Newland's Ch. Pr., 105. If the infant reside within twenty miles of London the guardian is appointed by the court, for which purpose the infant and the person intended to be appointed guardian personally attend in court. If the infant reside above twenty miles from London the guardian is appointed by commission, and the infant must be personally before the commissioners. 14 Ves., 172; 2 Newland's Ch. Pr., 151; 1 Har. Ch. Pr., 711, 712; 2 Mad. Ch. Pr., 279.

The Maryland act of 1715, c. 39, § 7, which allowed an infant of the age of fourteen to choose his guardian, required the infant to be called to court, and then and there to choose his guardian; and the act of 1798, c. 101, ch. 12, § 2, says: "The said court shall have power to call, or have brought before them, any orphan as aforesaid for the purpose of appointing a guardian."

If, as we have supposed, the only right which the infant had in Maryland to choose his guardian be given by the statute, it must be exercised in the manner prescribed by the statute. We think, therefore, that if the infant had a right to choose his guardian, it could only be done personally and in open court, and not having been so done, the election and appointment were void.

§ 754. *How a guardian can be lawfully removed.*

The fourth error assigned is that the petitioners were not cited to show cause why they should not be removed. That the petitioners, who were the actual guardians, and who had a right to continue such until the full age of their ward unless lawfully removed, should have had notice of his application, and an opportunity to show cause against it, seems to have been a course dictated by a common sense of justice. They had a power coupled with an interest, which they had a right, and perhaps were bound, to defend. But as we think the orphan had no right to elect a guardian, and, if he had, he could not exercise it out of court, we think the want of notice is a fatal error. The fifth error assigned is in substance only a repetition of the fourth.

Upon the whole we are of opinion that the orphans' court, having appointed Mr. Forrest and Mr. Mauro guardians of the infant until his age of twenty-one years, had no jurisdiction or authority to appoint Mr. Ritchie, and that his appointment is not merely voidable, but absolutely void; that Mr. Forrest and Mr. Mauro have never ceased to be guardians; and are now entitled to all the rights and powers of guardians; and that the sentence of the orphans' court, dismissing the bill of review, be reversed with costs; and that this court, proceeding to pass such sentence as the orphans' court ought to have passed upon the hearing of the bill of review, should order and decree that the order of the orphans' court appointing John T. Ritchie guardian to the infant John W. Ott be reversed with costs.

SPRAGUE v. LITHEBERRY.

(Circuit Court for Ohio: 4 McLean, 442-456. 1848.)

Opinion of the COURT.

STATEMENT OF FACTS.— This action is brought to recover possession of certain lots of ground in the city of Cincinnati. Deed from Steubens Harpers to Joseph Seaman, dated the 29th October, 1806, for the premises in dispute. Deed from Seaman and Steubens to Samuel Harpers, on the same day, signed by Seaman. Deed from Joseph Seaman to H. Hafer, 20th August, 1813, for five acres, a part of the land. Deed from Joseph Carpenter, dated 13th August, 1813, to H. Hafer for five acres. Deed from William Cooper to Henry Hafer, 26th May, 1813, for twelve acres and sixty-two hundredths.

It was proved that Henry Hafer died in 1825, in Cincinnati, and left three children, two daughters and a son. The eldest daughter died in 1832, leaving Caroline and Henry surviving. Hafer was in possession two or three years and claimed the property until his death. The property was improved and was situated in the Eastern Liberties, and one of the witnesses says that Hafer was in possession five years. Caroline married A. Sprague, one of the lessors of the plaintiff, and lives in Kentucky.

The defendants claim under an administrator's sale of the premises. A certificate was given in evidence under the seal of the court of common pleas, of Hamilton county, showing that Griffin Yeatman was appointed guardian of Caroline and Henry. Letters of administration were granted to Francis Kerr on the estate of Hafer. A record was offered in evidence, showing a petition by the administrator, stating the debts due by the estate of Hafer and that there was no personal property out of which the debts could be paid, and praying an order for the sale of real estate, etc. Griffin Yeatman, the guardian, acknowledged notice. This record was objected to, because it does not appear to be a final record, and was not signed by the judge. The court admitted the record, saying, that from the nature of the proceedings they took place at different times. Nothing more than an application by the administrator and an order of sale could take place at the first term. At a subsequent term the sale would be brought before the court, etc. The statute or usage requires that the signature of the judges, or of the presiding judge, should be signed to the minutes of the proceedings of each day; but it is not necessary that this shall appear in the record of each case. And an omission of the signature, it is supposed, would not make the proceeding void. The objection is not understood to relate to the authentication of the record.

The sale of the property was made on the 27th of May, 1826, to one Wicks and others, and deeds were made, as appears from the return of the administrator, to the purchasers. Deed from James Smith *et al.* to ——. Mortgage of Henry Hafer to Francis Kerr. The record of the court of common pleas was given in evidence in regard to the sale, etc.

A number of witnesses were examined to prove that at a certain time the children of Hafer were taken by some friends to Clermont county in Ohio. Objections to be made on the argument. On the part of the lessors of the plaintiff, it was argued that, to render the sale good, the heirs must have been made defendants. That this is the law of Ohio has been repeatedly decided. 2 Chase, Stat., 1311, sec. 19. Also the act 24 and the act of the 12th of March, 1831, are referred to, as requiring notice to the heir. That in the case of Ewing v. Higbee, 7 Ohio Rep., 340, it was held, coming up collaterally, that

the heirs must be notified. That in 12 Ohio, 253, where the question was collateral, it was held that notice to the heirs was essential to the exercise of jurisdiction. If the heirs were not made parties the proceedings would be void. That in 1 Hill, 139, it was ruled that infant heirs cannot be concluded by a surrogate sale of lands, without the appointment of guardian. In 1 Peters, 340, it is said there must be jurisdiction to protect officers from liability as trespassers. 12 Ohio, 195; 3 Ohio, 240; 11 Ohio, 442. Where there is no power to act, no legal consequences can follow. If there was no jurisdiction the proceedings were void. And that there was no jurisdiction may be shown *aliunde*. The heirs were not made parties by the appointment of Yeatman general guardian. This appointment was made nine days before the petition was filed.

The court had no power to appoint Yeatman guardian. 2 Chase, 1317. Power to appoint a guardian is limited to the county in which the court sits. In 2 Leigh, 719, evidence was admitted to show that the party was entitled to letters of administration. If such jurisdiction be exceeded by the court, the act is void. 9 Mass., 543. If letters of administration be granted in a county other than where the deceased resided at his decease, the grant is void. 5 Pick., 20, same. Also 18 Pick., 496; 8 Wend., 139; 2 Wms. on Executor, 1084. Where an appointment of a guardian is made for a minor without the county it is void. 12 Ohio, 195.

On the 20th December, 1825, the court appointed Griffin Yeatman guardian of the minor children of Henry Hafer, deceased. At this time the heirs were not in the county. Nine days afterward the administrator filed his application to sell the land. As guardian he acknowledged notice, and waived process. Four years afterward, in 1829, the court, without motion or notice, entered the following: "And now here, to wit, on 1st of September, 1829, the court being satisfied that Griffin Yeatman was appointed in November term, 1825, guardian *ad litem*, and accepted service after the appointment; that Yeatman swears that in November, 1825, he was so appointed at the request of Kerr, the administrator, on the application of Charles Fox, Esquire; and the court order the entry *nunc pro tunc*."

And it is contended that the record could not be so amended. 3 Ohio Condensed, 696; 5 id., 284; 1 Pet., 340; 3 Rand., 104. An order or judgment *nunc pro tunc* does not presuppose any such judgment had been entered. This is never done except on the death of a party, or to avoid prejudice by delay. 1 Starkie, Ev., 932; 1 Strange, 426; 1 Taunt., 385; 1 Burr., 146, 219. The court had no power in 1829 to amend the record of 1825. The power to amend may be inquired into. 6 Dana, 226; 1 Pet., 340; 20 Wend., 145; 23 id., 616; 3 Ohio, 337, 549, 560; 2 Ohio, 27; 2 Chase, 1275, sec. 96. Any defect in process or in the pleading may be amended — nothing else. This was not a clerical error. 3 McLean, 486. It is not proposed to amend the judgment, but to amend the record by inserting the judgment, which the clerk had neglected to do. 9 Ohio, 132; 3 Ohio, 523. Power of amendment at common law. 1 Bac. Ab., 145; 1 Salk., 47; 3 id., 31; 2 Wilson, 147; 27 Eng. Com. L., 264; 1 Pet., 432; 7 Pet., 422; 7 Pet., 432; id., 522. No power after the term to amend a judgment, except a mere matter of form. 2 Ohio, 248; 3 id., 486, 523-4, 577. Two contradictory records are before the court. If the judge had inspected the final record he would have corrected the errors.

If the court had the power to make the entry it could not do so legally without notice. 14 Pet., 154. But if the power may be exercised, it cannot operate

retrospectively. 2 Chase, 1274, sec. 87; 27 Com. L., 264. It is urged that the record affords no evidence that Yeatman was appointed a general guardian. That it has not the signature of the judge as required by the statute. 2 Chase, 1275, secs. 93-4. The object of requiring the judge's signature was to see that the record was correct. If the heirs are necessary parties they must be so made, to give jurisdiction. The sale was made under an old order. The power to sell must be in the hands of the sheriff.

The above points were discussed at large and ably by the complainants' counsel, and some authorities not named above were cited. The synopsis is a very imperfect one, but it states the ground on which the arguments for the plaintiffs were mainly founded; and it will enable the jury better to understand the views of the court. The controverted points in the case, gentlemen of the jury, are questions of law, which are, properly, referred to the court. These questions, however, refer to facts which are before the jury, and on which the questions of law arise. Hafer died in 1825. He left, as his heirs, two daughters and a son. In 1832 his eldest daughter died. Some short time after his death, the grand-parents took the children to Clermont, the place of their residence.

§ 755. *Whether one may be appointed guardian and also guardian ad litem.*

At November term, 1825, December the 20th, the court appointed Griffin Yeatman guardian of the persons and estates of Mary Hafer, aged nine years, Caroline Hafer, aged seven years, and Henry Hafer, aged five years; and the guardian gave bond in \$100 in each case. On the 29th December of the same year, Francis Kerr, administrator, filed his petition, naming the minor heirs as defendants, and stating the debts due by the estate and its assets, real and personal; from which it appears that the estate owed upwards of \$16,000, and the petition prayed that the real estate might be sold. And on the same day the following entry was made: "As guardian of the children, mentioned in the above petition, I hereby acknowledge notice of the above petition, and waive the necessity of process being issued." Signed, Griffin Yeatman.

And also, the following entry was made on the same day: "And now, here, to wit, on the 29th of December, 1825, in the term of November and year aforesaid, the petition of the administrator of Henry Hafer, deceased, for the sale of certain real estate therein described, notice acknowledged by Griffin Yeatman, guardian to the minors mentioned in the said petition, whereupon the court appointed Casper Hopple *et al.* appraisers, etc. An order of sale was issued, the appraisement having been made, dated 7th February, 1826. The administrator, after giving due notice, sold the real estate for about \$1,000 less than the appraisement."

The cause was continued regularly, until August term, 1829, when Griffin Yeatman made an affidavit that at November term he was appointed guardian *ad litem* for the minor heirs of Hafer, to appear in their behalf, in an application by the administrator for the sale of the real estate of Henry Hafer, deceased, which appointment he supposed had been entered, and he requested that it might then be entered, etc. And the court at the same term say, being satisfied that Griffin Yeatman was appointed guardian *ad litem* for the defendants, to defend this suit, at the term of November, 1825, and prior to the order of appraisement in the cause, who then accepted of his appointment, and appeared in the case, and that the defendants, by their said guardian, appeared in the cause prior to the said order of appraisement; and it being suggested that there is a doubt whether the said facts sufficiently appear of

record, it is ordered to be entered, as of the term of November, 1825, that said Griffin Yeatman was appointed by the court guardian *ad litem* for said defendants, and that the said guardian voluntarily appeared, etc., and the sale was ratified.

It is contended that there could have been but one appointment of guardian. The guardian first appointed was of the persons and estates of the minors. He was appointed the 20th of December, 1825, and gave bonds on the 29th of the same month. There can be no mistake as to this appointment. It is not only matter of record, but the facts are so clearly stated as to leave no room for doubt. This appointment was made before the petition by the administrator for the sale of the real estate was filed.

It appears that, subsequent to this appointment of guardian, the same person was appointed guardian *ad litem*. This was, no doubt, supposed to be necessary in the prosecution of the petition. The defense set up under the mortgage cannot be sustained. If the proceedings are void, there is no connection by any of the defendants with the mortgage. And if the proceedings be valid, the mortgage has been discharged, and in no sense can it constitute an outstanding title to affect the recovery of the lessors of the plaintiff.

It is said there are discrepancies between the records. The final record is admitted to be evidence, though not signed by the judge. In the case of *Osborn v. The State of Ohio*, 7 Ohio (part 1), 212, it is said: "The signature of the presiding judge adds no validity to a record; and the record itself would be evidence, or an exemplification might be sent abroad and used, without such signature." The final record differs from the short entries made in the blotter. And this difference always exists. In the minutes the petition or pleading is never stated at length. Short entries are made, from which, and the papers referred to, the record at length is made up.

§ 756. *Every presumption is in favor of a court having general jurisdiction.*

Has a court the power to inquire into the jurisdiction of the court whose record is offered in evidence? This power is necessarily exercised by all courts. But in making such an inquiry, the court must be careful to discriminate between what constitutes jurisdiction and error. Where a court, from its general powers, has jurisdiction of the subject-matter, a due notice served on the party, if the proceeding be *in personam*, or an attachment laid on the land, if the proceeding be *in rem*, gives jurisdiction; and, after this attached, no proceeding in the subsequent stages of the case, however erroneous, will make them void. *Bank of United States v. Voorhees*, 10 Pet., 449; 1 McLean, 224.

In this respect there is a difference between courts of a general and a limited or special jurisdiction. In the latter, the facts must appear on the face of the proceedings which give jurisdiction, but in the former, jurisdiction is presumed, unless the contrary appear. In the one case, jurisdiction may be presumed; in the other, no such presumption lies. In *Grignon v. Astor*, 2 How., 339 (COURTS, §§ 496-500), which involved collaterally the validity of an administrator's sale, the court say: "No other requisites to the jurisdiction of the county court are prescribed than the death of Grignon, the insufficiency of his personal estate to pay his debts, and a representation thereof to the county court where he dwelt, or his real estate was situate, making these facts appear to the court."

And that proceeding was under a law which required "the said courts, previous to their passing on the said representation, shall order due notice to be

given to all parties concerned, or their guardians," etc. To give jurisdiction in the case before us, must the heirs be made parties? This is a question, as has been contended by the counsel for the plaintiffs, under the Ohio statutes, and we follow the construction of the statutes by the supreme court of the state. In the 16th of Ohio, a proceeding to sell the lands of the deceased was declared void, "where no notice was given to the heirs, and the land was not described." *Adams v. Jeffries*, 12 Ohio, 274, the court say: "the heir has a right to be a party to the proceedings which deprive him of his estate, and we are constrained to deny the jurisdiction of a court which attempts to proceed without him."

There are some general expressions (*Robb v. Lessee of Irwing*, 15 Ohio, 700) which would seem to conflict with the above. The court say, "with these things the court of probate, on an application to sell land, have nothing to do any further than to ascertain whether there are debts; whether the personal assets are sufficient, and whether it is necessary to sell the land," etc. But the question in that case was, whether a guardian *ad litem* could waive process and appear? By the nineteenth section of the act which regulates these proceedings (2 Chase, 134), it is provided "that the application shall be by petition, to which the lawful heir, or the person having the next estate of inheritance of the testator or intestate, shall be made defendant."

§ 757. *A guardian may waive process and appear for his wards.*

In *Ewing v. Hallister*, 7 Ohio, 138, the court say, "before the passage of this act it was held that a citation, served on the general guardian of an infant defendant, was a proper mode of giving such defendant notice of the pendency of the petition. It is admitted that the general guardian may waive process, and appear for the minors. This was done in this case, by Griffin Yeatman, the guardian. Was Yeatman duly appointed guardian? Before this answer is given, it may be proper to inquire whether we can go beyond the entry upon the record.

The statute provides "that the court of common pleas shall have power, whenever they consider it necessary, to appoint a guardian or guardians to all minors within their county," etc. In the case of *Lessee of Mason v. Sawyer*, 12 Ohio, 195, the court held that the appointment of guardian is open to inquiry collaterally. And they say, "if the plaintiff's lessor was not so within the county, he being the minor, the court had no jurisdiction; and the fact may be shown in this collateral way." In *Lessee of Perry v. Brainard*, 11 Ohio, 442, the court held "that the guardianship of a minor female expires, by operation of law, when the ward arrives at the age of twelve years." In both these cases the minor was the plaintiff in the suit.

§ 758. *The proceedings of a court in appointing a guardian cannot be inquired into collaterally.*

The only objection to the first appointment of Yeatman is, that the minor heirs were not within Hamilton county at the time the appointment was made. That this would be examinable by the supreme court, on a *certiorari* or otherwise, may be admitted. But can it be examined into collaterally? In *Ludlow's Heirs v. McBride*, 3 Ohio, 257, the court say, "so far as the courts of common pleas were invested with jurisdiction over the subject-matter upon which they have acted, their decisions and orders are final and conclusive; if not reversed for error, they cannot be impeached collaterally. The grounds and proofs on which they proceeded are not examinable in this case."

This is an important question of law, which must rest upon general principles, and does not depend on the construction of a statute. In making the appointment of guardian, the court having general jurisdiction is presumed to have examined the facts on which their jurisdiction depended. The court held, in *Lincoln v. Tower*, 2 McLean, 485, "that the appearance of the defendant is a material fact, and so is the service of process. It is admitted that the allegations in a record which were not material nor traversable are not conclusive on the parties. But the record is conclusive of all matters in relation to the judgment which were material, and which might have been traversed." 2 Serg. & R., 123; *Leech v. Armitage*, 2 Dall., 125; *Green v. Owington*, 16 Johns., 58.

In *Thompson v. Tolmie*, 2 Pet., 165 (COURTS, §§ 475-79), the court say, "the age of the heirs was at all events a matter of fact upon which the court was to judge; and the law nowhere requires the court to enter on record the evidence upon which they decided that fact. And how can we now say but that the court had satisfactory evidence before it that one of the heirs was of age." If it was so stated in terms on the face of the proceeding, and even if the jurisdiction of the court depended upon that fact, it is by no means clear that it would be permitted to contradict it on a direct proceeding to reverse any order or decree made by the court. But to permit that fact to be drawn in question collaterally is certainly not warranted by any principle of law.

The principle was decided in the case last cited, which must govern the question now under consideration. The matter of fact, as to the residence of the minors when Yeatman was appointed guardian, was, of necessity, before the court of common pleas when they made the appointment; and it was not necessary to place that fact upon record. That court determined it, and can the fact be open to proof collaterally when the record is offered in evidence? If such be the law, then every fact necessary to be established in a judicial proceeding, whether it relate to the jurisdiction of the court or to the merits of the case, and which did not constitute a part of the record, is open for examination. And how numberless are these facts in the action of courts? In this view less effect would be given to the judgment of the court than to the verdict of a jury. In the transaction of its business, a court, in almost every step taken in a cause, must act upon rules adopted by statute or by judicial discretion. And all these rules impose limitations, within which certain things must be done. And when the court, having the subject before it, decides a matter under these rules, can such matter ever be inquired into collaterally?

I am aware that, in New York, it was held, where no fraud or unfairness was alleged in regard to the service of process, evidence might be heard to contradict the return of the officers; in a case on a record from a sister state that decision, I think, must stand alone.

Nine days before the petition was presented by Kerr, Yeatman was appointed. A waiver of process and an entry of his appearance were made in the presence of the court, and were entered upon its record. Should the fact under consideration be held to be open, collaterally, it is impossible to say to what uncertainties and mischiefs the principle might lead. How is the evidence on which the court acted to be preserved? Life is uncertain, and a fact susceptible of clear proof now, may be involved in great uncertainty twenty years hence. No one may be able to prove it. And shall titles, under judicial sales, rest upon so uncertain a basis?

§ 759. *Absence of the infant from the county when the guardian was appointed does not oust the jurisdiction of the court. What fixes the infant's domicile.*

Admit all that is contended for, in regard to the residence of the infants, when the guardian was appointed. No one will contend that the minors must, in fact, be within the county when the appointment was made. They may have been absent on a visit; their own mother was not living, and they were left in the charge of their step-mother. Her home would be their domicile, and, by the law, she was entitled to occupy the mansion-house one year from the death of her husband.

What is to fix the domicile of infants? The home of these infants was in Hamilton county. Their property was there, and it was there only that a guardian could properly be appointed. If they had not, at the time, an actual residence in Hamilton county, they had constructively. It was the place of their birth, where their father and mother lived and died, and where all their property was to be found. They had left the county, at most, only a few months before this appointment was made. There is no suggestion of fraud or unfairness in the appointment.

If it were proper now, after the lapse of twenty-three years, to inquire into these facts, how are we to ascertain that the court of common pleas had not evidence before it that the absence of the minors from the county was only temporary, and did not affect their domicile? If this question were open, we should incline to say that the residence of the infants with their grand-parents, for a few months, in Clermont county, is not evidence of a change of domicile, under the circumstances, so as to affect the jurisdiction of the court. But we think that this matter, without an allegation of fraud or unfairness, is not open for inquiry, especially after the lapse of twenty-three years.

§ 760. *A court can make amendments nunc pro tunc.*

The amendment at the instance of Kerr, the administrator, on the affidavit of Yeatman, 1st September, 1829, who stated that at the November term he was appointed guardian *ad litem*, as a prerequisite by the court to the attainment of an order to sell the land, was the exercise of a discretion which no court, in a collateral manner, can disregard or treat as a nullity. It was not, in fact, the amendment of a judgment or an order. It was supplying the omission of the clerk in failing to enter, as his duty required, the appointment. The court was satisfied from the evidence that the appointment had been made by them, and that the clerk had failed to perform his clerical duty in entering it. The case had proceeded upon the presumption that the entry of the appointment had been made as ordered. The capacity of Yeatman as guardian *ad litem* had been recognized in several important steps taken in the case. By the entry *nunc pro tunc*, no one was taken by surprise, no one gained an advantage; in the opinion of the court, such an entry was necessary to legalize the proceedings. The debts of the estate were large and no doubt pressing, and it was the interest of the heirs to have them paid; under such circumstances, the order was entered. It had every equitable consideration to recommend it, and there was no objection to it, as it seems, of any force. The objection comes after the lapse of near a quarter of a century, when the land, in the hands of the purchasers, their heirs or grantees, by the improvements thereon, and by the growth of the city, has become of immense value, and it is made before a different tribunal from that which authorized the entry: under such circumstances the objection cannot be sustained. When the order was

made, the parties were still before the court, the cause having been regularly continued to that time, and under the circumstances we are not prepared to say that a court should set aside the proceeding which exercised a supervisory power over the action of the common pleas — but the only question before us is, whether the order was void. We think it cannot be so treated. The questions of law having been considered by the court, gentlemen, but little has been left for your consideration. Your verdict will be made under the opinion of the court expressed.

MATHEWSON v. SPRAGUE.

(Circuit Court for Rhode Island: 1 Curtis, 457-464. 1853.)

STATEMENT OF FACTS.—Ejectment to recover an undivided interest in certain land. Plaintiff was the grandson of William Sprague, and, together with his sister and brothers, was a minor at the death of his grandfather. The defendants claimed under the will of William Sprague, and, on its being offered in evidence, the plaintiff objected because it had not been duly proved. It appeared that two sons of the testator, William and Amasa, were executors and residuary devisees and legatees, and that the greater part of the estate was devised to them; it also appeared that when the will was offered for probate, the court dispensed with notice, on the written consent of all parties known to the court to be interested, and residing within the state, and that consent was given for the plaintiff and his brothers and sister by their guardian, Amasa Sprague.

§ 761. *A statute guardian cannot represent his ward in any suit, wherein their interests differ, except by force of some statute.*

Opinion by CURTIS, J.

The questions are, whether the probate of this will is defective, and, if so, whether that defect renders the decree void, or only voidable, by some appropriate proceeding to be had in that matter, by appeal or otherwise, as provided by law. To enable a statute guardian to bind his ward by a proceeding in a court of justice, some statute authority must be found for his act. The statutes of the several states on this general subject are not uniform, but I am not aware that anywhere the statute guardian is made, generally, competent to represent his ward in legal proceedings. The general rule certainly is, that a guardian *ad litem* is to be appointed for that purpose. 1 Johns., 509; 10 Johns., 486; 8 Cow., 365; 3 Chitty's Gen. Pr., 288. And this rule extends to probate courts. Hart v. Gray, 3 Sumn., 339. It is very clear that no court would appoint the statute guardian guardian *ad litem*, if his interest were directly opposed to that of the ward. Parker v. Lincoln, 12 Mass., 16; Noyes v. Barber, 4 N. H., 406.

§ 762. *A court of probate, being of special and limited jurisdiction, must act strictly in the manner prescribed by the statute. Rhode Island statutes considered.*

The defendants' counsel do not assert that Amasa Sprague, who was one of the residuary legatees and devisees under the will, and, therefore, strongly interested to procure its probate, could, as statute guardian, represent and bind his wards, in that proceeding, unless some authority to do so can be found in the statute law of Rhode Island; but they urge that such authority is found in an act passed in 1822, and found in the Digest of 1822, page 214.

The tenth section of this act was as follows: "That previous to the render-

ing of any order or decree in any matter before them, the said court of probate shall give to all known parties interested, living within the state, at least three days' notice, that they may be heard thereon; which notice shall be served by the town-sergeant, or constable, or the sheriff or his deputy, by reading the same to the party, if found, or otherwise by leaving an attested copy at the last and usual place of abode of such party; *and when infants or wards are interested, notice aforesaid shall be served on their respective guardians*; or such court may give notice, as aforesaid, to all parties, by advertisement printed three successive weeks in some newspaper printed within this state." And the section then proceeds to declare the effects of an appeal upon the different kinds of decrees made by probate courts.

The first section of the act of January 20, 1824 (Pub. Laws of R. I., 578), repeals so much of the tenth section of the said act as provides for the manner of giving notice. The second section requires that, previous to the rendering of any order or decree in any matter before them, the court of probate shall cause all parties known to them to be interested, living within the state, to have notice. It then prescribes different modes of giving notice, and then provides that if all such parties shall have given their consent in writing, the court may proceed without notice.

It is argued that the clause in this tenth section, respecting the service of notice on guardians, is not repealed; and that if, by law, notice was to be served on the guardian, it was competent for him to consent to proceed without notice. I do not know that this necessarily follows, especially in a case like the present. It can hardly be supposed the law intended that a guardian, interested against his ward, would represent him in court; it must have expected that the effect of a notice to his ward, served on him, would be, that he would take care that his ward was properly represented in court by another; and not that he would consent to have the court proceed *instantly*, without actual notice to the ward, and without such fit representation being provided for by the ward, or his friends, or the court. And it does not seem to me that an authority to take a legal notice, of a length prescribed by law, for the ward, necessarily, and in all cases, implies an authority to shorten the time and agree to a proceeding *instantly*. But it is not necessary to rest upon this; for I think this clause in the tenth section is repealed.

The repeal is of so much of the tenth section as provides for *the manner of giving notice*. This is not a repeal of the whole section; but besides the first part of the section which relates to notices, there is another part which relates to the effect of an appeal. This satisfies the restrictive words, "so much," etc.; and though it is only what relates to the manner of giving notice which is repealed, yet the clause in question, which provides a manner of giving notice to wards by serving on their guardians, is clearly within the description of the part repealed. My opinion is, that this guardian was not empowered by any statute to consent in writing for his ward, and consequently that the proceeding was irregular. And I think it very clear that this irregularity was of such a nature as to render the decree utterly void as against this plaintiff.

A court of probate has only a special and limited jurisdiction. And being expressly required by statute, before making any decree, to cause those interested to have notice, if it proceeds to make a decree without complying with this requisition of law, any party entitled to notice may treat such a decree as void; and this upon several grounds.

1. Because the court has not jurisdiction to determine the rights of such parties. This was held by the supreme court, in *Harris v. Hardeman*, 14 How., 344, in respect to a court of common law, which had rendered a judgment by default, without notice. And in numerous cases the same law has been applied to courts of probate. 11 Mass., 507; 5 Pick., 343; 18 Pick., 115; 3 Cush., 352; 3 Sumn., 339.

2. This court being of a special and limited jurisdiction can do no binding act which is prohibited by statute, and it is prohibited to make a decree without notice. 2 Mass., 120; 7 Mass., 70; 4 Mass., 117; 11 Mass., 513, 514, and the cases there cited.

3. The plaintiff could not appeal, for he had no notice of the decree; and no writ of error will lie; whenever a person interested cannot have remedy according to law, by writ of error or appeal, he may avoid the judgment or decree by plea and proof; that is, whenever it is set up to affect his rights, he may aver its nullity. 11 Mass., 513, and cases there cited; 17 Mass., 91; 2 Met., 138.

§ 763. — *this applies to the probate of a will which in this case had not been duly decreed.*

It has been argued that though this may be so in cases affecting the person, these principles are not applicable to a decree of probate of a will. That this was a proceeding *in rem*; and when the will was filed the court obtained jurisdiction, and its decision that the guardian could consent for the ward, though it may have been erroneous, was an error occurring in the exercise of its jurisdiction.

It is true the proceeding is, in some sense, *in rem*; but so was the proceeding in 11 Mass., 507, where this subject was very carefully considered, and in 4 Mass., 117, and 7 Mass., 70, and 17 Mass., 91. These were decrees of partitions, which were strictly *in rem*. And there is no sound reason for any distinction between decrees *in rem* and *in personam*. In *The Mary*, 9 Cranch, 126, 142, 144, the supreme court, speaking of proceedings *in rem*, say: "Notice of the controversy is necessary in order to become a party; and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, express or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally or by publication; where they are *in rem*, notice is served on the thing itself."

In *Bradstreet v. The Neptune Ins. Co.*, 3 Sumn., 608, Mr. Justice Story held such a proceeding void for want of notice of specific allegations; and he uses this language: "I hold, therefore, that if it does not appear upon the face of the record of the proceedings *in rem*, that some specific offense is charged, for which the forfeiture *in rem* is sought, and that due notice of the proceedings has been given, etc., it is not a judicial sentence," etc. Yet, in that case, the vessel proceeded against was within the jurisdiction of the court. The case in 4 N. H., 406, is also directly in point. Nor can it be maintained that this error occurred in the exercise of jurisdiction. It is true, the probate court, on the receipt of the will, has jurisdiction for the purpose of placing and retaining the will on its files, and issuing the proper notices to the parties in interest, and causing witnesses to be summoned and sworn, and taking all steps preliminary to a hearing; but it has not jurisdiction to make a decree until all parties entitled by law to notice have been duly notified; and if it proceed to make a decree without notice, it acts without authority, and its decree is void. It is of

no importance that it decided that notice was not necessary in the particular case, because the guardian had consented for the ward. If notice was necessary by law, the court had no power to dispense with it; and whether it thought the dispensing power existed, or what were its reasons for thinking so, are immaterial. The result is that this will has not been proved.

HOYT v. SPRAGUE.

(18 Otto, 618-637. 1890.)

APPEAL from U. S. Circuit Court, District of Rhode Island.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—These cases come up on appeal from the decrees of the circuit court for the district of Rhode Island dismissing the complainants' bills. One of the bills was filed by William S. Hoyt and the other by Charles G. Francklyn and Susan, his wife, against Amasa Sprague, William Sprague, individually, and as guardian of the said Hoyt and said Susan; Fanny Sprague, widow and administratrix of Amasa Sprague, Sen.; Mary Sprague, widow and administratrix of William Sprague, Sen., and formerly guardian of said Hoyt and said Susan; The A. & W. Sprague Manufacturing Company, and Zechariah Chafee, assignee of said company for the benefit of creditors, etc. The general object of the bills is to establish a lien and trust in favor of the complainants, as grandchildren of William Sprague, Sen., against the property of the A. & W. Sprague Manufacturing Company, now in the hands of Chafee, the assignee, each to the extent of one twenty-fourth part of the whole property; that being the amount of their interest in the property of the former firm of A. & W. Sprague, which was transferred to the corporation in 1865, whilst the complainants were infants, in fraud, as they allege, of their rights.

Many charges of fraud are made in the bills against the defendants Amasa Sprague and William Sprague, who carried on the business of the firm after the death of William Sprague, Sen., in 1856, in connection with Byron Sprague, until 1862, and after that by themselves. The cases are substantially the same in all respects, and will be considered together. In order properly to understand the questions raised, it will be necessary to take a summary view of the facts.

Amasa Sprague and William Sprague, brothers, under the name of A. & W. Sprague, carried on the manufacturing business in Rhode Island until 1843, when Amasa died, leaving a widow, Fanny Sprague, and four children, two sons and two daughters. The widow took out letters of administration on her husband's estate. The value of the partnership property at that time was estimated at \$100,000. William continued to carry on the business with the joint capital, under the same firm name, for the benefit of himself and his brother's family, for thirteen years, when, on the 19th of October, 1856, he died, leaving a widow, Mary Sprague, a son, Byron Sprague, and four grandchildren, who were the children of a deceased daughter, Susan, and her husband, Edwin Hoyt, of the city of New York. These children were at that time under fourteen years of age. Their names were Sarah, Susan S., William S., and Edwin Hoyt, Jr. Sarah was twelve, Susan eleven, and William S. was nine years old at the time of their grandfather's death. William S. Hoyt is the complainant in one of the cases now under consideration, and Susan S. Hoyt, now wife of Charles G. Francklyn, with her husband, is complainant in the other case.

William Sprague largely extended the business of the firm, so that when he died the property, real and personal, was estimated at about \$3,000,000. Shortly before his death, and during his last illness, he took into partnership with him, evidently for the purpose of continuing the business and keeping it together, his own son, Byron, and his two nephews Amasa and William, the sons of his deceased brother Amasa. The terms of this partnership, and the interest which the young men were to have in it, do not appear. They continued, after William Sprague, Sen.'s, death, to carry on the business, as it had previously been carried on, under the name of A. & W. Sprague, without making a settlement with the representatives or beneficiaries of either Amasa Sprague's or William Sprague's estate.

William Sprague, Sen., left no will; and his widow, Mary Sprague, took out letters of administration on his estate. Whilst, therefore, the three young men, Byron Sprague, Amasa Sprague, and William Sprague, as surviving partners of William Sprague, Sen., carried on the business of the firm of A. & W. Sprague, the persons really interested were, first, the two widows and administratrixes, Fanny Sprague and Mary Sprague, who were legally entitled respectively, by right of administration, to the several interests of Amasa Sprague, Sen., and William Sprague, Sen.; and, secondly, the beneficiaries, or distributees of the estates of Amasa and William, respectively, namely, the widow and four children of Amasa Sprague, Sen., and the widow and two children of William Sprague, Sen.,—one of the latter, Mrs. Hoyt, being deceased, and being represented by her four children.

One of the daughters of Amasa Sprague had been settled with before William's death, and the other shortly afterwards, by her brothers purchasing her interest. This left the beneficial interest of the property divisible into six equal parts, belonging respectively to Fanny Sprague, widow of Amasa, and her two sons, Amasa and William, and Mary Sprague, widow of William, her son Byron, and the children of her daughter, Susan Hoyt. These persons were all of age, and otherwise *sui juris*, except the Hoyt children, and were all able to consent, and did consent, that the entire partnership estate should be continued in the business of the firm as it had been before. The Hoyt children, of course, could not give any such consent. They resided with their father, Edwin Hoyt, in New York, who was at the head of a commission-house in that city by the name of Hoyt, Spragues & Co., which sold on commission a large portion of the goods manufactured by A. & W. Sprague. The partners of the firm were associated with him. Of course he must have been well acquainted with the business of the manufacturing establishment, and the large interest which his children had in the concern must have insured his attention to its management. Mr. Hoyt consented to and approved of the continuance of his children's portion in the business of the partnership; and his natural regard for their interests, in connection with his opportunities for observation, preclude the presumption that such continuance was the result of any fraudulent scheme. Had any such scheme been in contemplation, he must have detected and would have thwarted it.

In addition to the consent and acquiescence of their father was that of their property guardian in Rhode Island. On the 9th of February, 1857, shortly after William Sprague, Sen.'s, decease, letters of guardianship were issued by the probate court of the town of Warwick, R. I., to Mary Sprague, grandmother of the Hoyt children, on the property of said children. Mrs. Sprague consented that both her own interest in the estate and that of her grandchild-

dren and wards should be continued in the partnership business. At that time (1857) this business was no doubt regarded by most persons who had any acquaintance with it as highly prosperous, and an investment in it advantageous and safe. And whilst, according to the strict rules of law, Mary Sprague should have drawn out the children's share, and should not have left it to the hazards of trade, it may be said in her excuse that she was following out the plan of her husband, who had for thirteen years induced his brother's widow to continue the interest of her children in the concern, and had thereby greatly increased their inheritance. At all events, we have no evidence that Mary Sprague was actuated by any other than the most worthy motives in permitting everything to remain in the business. Any charge of fraud against her cannot be entertained for a moment.

The business was conducted without change until 1862, when Byron Sprague sold out his interest to Amasa and William, and upon an account taken at that time said interest was valued at \$605,722.78, which amount was accordingly paid to him. No other change in the situation of the parties interested took place until 1865, when it was proposed to place the property of A. & W. Sprague in a corporation or corporations, charters having been obtained from the legislature of Rhode Island for that purpose. One of these charters was passed in May, 1862, and constituted Byron Sprague, William Sprague and Amasa Sprague, and their associates, successors and assigns, a body corporate and politic by the name of A. & W. Sprague Manufacturing Company, with a capital stock of \$1,000,000, to be divided into shares of \$100 each.

In view of such proposed corporate organization, Mary Sprague, as guardian of her grandchildren, and Edwin Hoyt, their father, in January, 1863, presented a petition to the legislature of Rhode Island, in which, after stating the appointment of Mary Sprague as the guardian of the estate of said minors, and their interest in the property of A. & W. Sprague, they stated that they deemed it advisable to invest the same in such corporations as should be organized under the charters previously granted; and they asked that the said Mary, as such guardian, might be authorized to make such conveyance as would be necessary to that end. On the 9th of March, 1863, a joint resolution of the legislature was passed, granting said petition, which resolution was in the following terms:

"RESOLUTION authorizing Mary Sprague, of Warwick, guardian, to make conveyance of the interest of minors in and to the property of the firm of A. & W. Sprague.

"Upon the petition of Mary Sprague, of Warwick, widow of William Sprague, late of Warwick, deceased, and of Edwin Hoyt, of the city and state of New York, representing that the said Mary is guardian of the estates; and the said Edwin, father of Edwin Hoyt, Jr., Susan S. Hoyt, Sarah Hoyt and William S. Hoyt, minor children and heirs-at-law of Susan Hoyt, deceased, and praying, for certain reasons, that the said Mary may be authorized and empowered to make conveyance, in her said capacity, of all the right, title and interest of said minor children, as heirs-at-law of their said mother, in and to all the estate and property, real, personal and mixed, now held, owned and managed by the firm of A. & W. Sprague, of Providence:

"*Voted and resolved*, that the prayer of said petition be and the same is hereby granted; and the said Mary Sprague, in her capacity as guardian of the estate of Edwin Hoyt, Jr., Susan S. Hoyt, Sarah Hoyt and William S. Hoyt, is hereby authorized and fully empowered, whenever any corporation

or corporations shall be organized under either or any of the charters heretofore granted by the general assembly of this state, and conveyance or conveyances shall become necessary to vest the title of the parties interested in any of said property so held, owned or managed by the firm of A. & W. Sprague, in any such corporation or corporations, to make, execute, seal, acknowledge, stamp and deliver all and any such conveyance and conveyances to any such corporation or corporations as shall be necessary to vest the right, title and interest of the said minors in and to said property, or any portion thereof, in any such corporation or corporations; and that any such conveyance or conveyances so executed, acknowledged, stamped and delivered, shall be deemed and held as valid and effectual in law and in equity to vest the title of said minors in any such corporation or corporations as though the same were executed, acknowledged, stamped and delivered by said minors after attaining their majority.

"*Provided*, that before the delivery of any such conveyance or conveyances, the said Mary shall have executed and delivered to the court of probate of Warwick every such bond or bonds with herself in her said capacity, and said Edwin Hoyt, as principals, in such penal sum or sums and with such sureties as said probate court shall require, conditioned for the investment of the amount of the full value of the interests of said minors, which she shall then be about to convey in the capital stock of any such corporation or corporations to which the same shall be conveyed, in the names and for the use and benefit of said minors."

Further, in view of the proposed corporate organization, steps were taken by the parties in interest to ascertain the value of the partnership assets, and the relative interest of each shareholder. For this purpose an agreement was entered into on the 1st day of April, 1865, between all the parties, Fanny Sprague signing individually and as administratrix of Amasa Sprague; Mary Sprague signing individually and as administratrix of William Sprague and as guardian of her grandchildren, and the other parties signing in their own behalf; by which it was agreed that John A. Gardner and Benjamin F. Thurston, the former of whom had been counsel for Amasa Sprague and William Sprague, and the latter counsel of Mary and Byron Sprague, should be, and they were, appointed referees to examine into the entire assets and property of the firm, and to ascertain the value thereof, and each party's interest therein, and should make report of the result. The referees accordingly made such examination, and made their report on the 1st day of July, 1865, by which they reported and found:

That the cash value of the entire estate, exclusive of the Quidnick factory (which was estimated by itself, and was transferred to a separate corporation),

was	\$6,782,906 69
That there were liabilities to amount of	2,871,921 79
Leaving the net value of the estate equal to	3,860,984 90

And after adjusting the accounts of the parties they found:

Mary Sprague's interest was	\$624,984 69
Fanny Sprague's interest	625,511 69
William Sprague's interest	978,867 42
Amasa Sprague's interest	978,867 42
Mary Sprague, guardian of the children of Susan Hoyt	652,758 68
Due to Mary Sprague, as administratrix of her husband, on account of a dividend	164,250 26
Making a total of	\$4,025,235 16

This amount formed the capital stock of the corporation subsequently organized, and was represented by the nominal capital of \$1,000,000, making each share equal to over \$402. The proportions of William and Amasa were larger than the others, because they had purchased the share of Byron.

The referees also found due from the firm to Mary Sprague, as guardian of the Hoyt children, the sum of \$188,333.33, explained to have been a balance credited to them to equal what the two families in Rhode Island had drawn out of the concern for current expenses.

The Quidnick property which, as before stated, was kept separate from the rest on account of other persons being interested therein, was appraised in the same way as the A. & W. Sprague property, for the purpose of being transferred to a distinct corporation. The interest of the Hoyt children therein was appraised at \$63,353.23.

The appraisement having been completed, Mary Sprague, as guardian of the Hoyt children, on the 5th of August, 1865, after advertising her intent so to do, presented her bond to the probate court of Warwick for approval, as required by the joint resolution of March 9, 1863, and prayed authority from the court to transfer the interest of her wards to the A. & W. Sprague Manufacturing Company, as authorized by said resolution; and also prayed like authority to transfer the interest of the minors in the Quidnick property to the Quidnick Manufacturing Company.

A decree was made granting the prayers of the petition and conferring the powers desired. Thereupon, on the 9th day of August, 1865, all the parties in interest joined in a conveyance of the entire partnership property of the firm of A. & W. Sprague to the A. & W. Sprague Manufacturing Company; and the property of the Quidnick firm to the Quidnick Manufacturing Company; and each party became entitled to their several proportions of the shares of capital stock in those companies respectively. In executing the deed of conveyance Mary Sprague signed in her individual capacity, as administratrix of her husband's estate, and as guardian of the Hoyt children.

In the August term, 1866, of the probate court of Warwick, appraisers were appointed to take an inventory and appraisement of the property of the several wards of Mary Sprague in her hands, and they performed their duty, and said inventories, verified by the oath of Mary Sprague, were filed and recorded after being passed upon by the court. They amounted to the sum of \$251,447.08 each. That of William S. Hoyt was composed of the following items, namely:

One hundred and twenty-two shares National Bank of Commerce.....	\$6,222 00
One U. S. six per cent. bond.....	108 09
Two N. Y., Prov. & Boston R. R. bond, \$950.....	1,900 00
Four hundred and thirty-nine shares A. & W. Sprague Manuf'g Co., 402, 5,225...	176,707 88
One hundred and twenty-three shares Quidnick Co. stock, 155, 218.....	19,091 20
Cash.....	334 23
	<hr/>
	\$204,363 75
Dividend due from A. & W. Sprague as cash, March 31, 1865, with interest from that date.....	47,083 88
	<hr/>
	\$251,447 08

The others were nearly identical with this.

The dividend of \$47,083.33 was William S. Hoyt's one-fourth part of the sum of \$188,333.33 awarded to the Hoyt children as an offset to the sums drawn out by the Rhode Island families for current expenses. At the same

term Mary Sprague presented an account as guardian of each ward, which, being verified, and due notice having been published, was received and allowed by the court and ordered to be recorded.

Sarah Hoyt, having now arrived at full age, received the amount of her interest, and gave an acquittance for the same. At the same term of the court, on the petition of Mary Sprague and her resignation of the guardianship of the three remaining minors, and on the written application of Edwin Hoyt, and due notice given, Mary Sprague was discharged from the guardianship, and William Sprague was appointed guardian in her stead. The same appraisers were appointed to make an inventory and appraisal of the property of each ward in the hands of William Sprague, guardian; and such inventory and appraisal were duly made, filed and recorded; showing that the estate of William S. Hoyt amounted, on the 1st day of September, 1866, to the sum of \$255,885.04, consisting of the items before mentioned, with the addition of another dividend of the companies. The estate of Susan S. Hoyt amounted to about the same sum.

Susan S. Hoyt came of age in October, 1866, and William S. Hoyt in January, 1868; and Susan married Charles G. Francklyn in 1869.

The evidence in the case exhibits several annual accounts rendered by William Sprague, as guardian to the complainant W. S. Hoyt, after he came of age, in 1870, 1871, 1872 and 1873. These accounts show on the credit side the money due and accruing to the complainant, including the sum of \$47,083.33 before mentioned, and the dividends made from time to time on the stocks of the A. & W. Sprague Manufacturing Company, the Quidnick Manufacturing Company, and on the bank and other stocks in the guardian's hands. On the debit side they show the moneys drawn by and paid to the complainant, amounting, from the date of Mr. Sprague's appointment as guardian in 1866 to October 31, 1870, to the sum of \$5,282.45; thence to October, 1871, \$8,606.72; to October, 1872, \$18,500; to October, 1873, \$5,000. Leaving a balance still in the guardian's hands of \$63,905.18, besides the stocks and bonds, forming the *corpus* of the estate in ward.

William S. Hoyt some time in 1873 received his stocks and interest in the Quidnick Company, and makes no complaint in regard to the same.

A number of letters of the complainant, asking for and acknowledging the receipt of money from his guardian after coming of age, were put in evidence. One of these, dated November 9, 1870, was directed to Mr. Greene, book-keeper of the A. & W. Sprague Manufacturing Company, asking for a memorandum of the bank stock, shares, and whatever there might be belonging to him. In his testimony the complainant states that this information was furnished to him. A similar statement had been furnished to Mrs. Francklyn in March of the same year; and annual accounts were rendered to her from October, 1869, to October, 1873.

In the fall of 1873 Hoyt, Spragues & Co. and the A. & W. Sprague Manufacturing Company suspended payment, and the latter, by deed of assignment dated November 1, 1873, assigned to Zechariah Chafee all its property in trust for the benefit of creditors,—in which deed Amasa and William Sprague and Fanny and Mary Sprague also joined. In April, 1874, a more full assignment was made.

The bills in this case were filed in June and July, 1875, and their general object has already been stated. They respectively state most of the facts of which the foregoing is an outline, but interlarded with reiterated charges of

fraudulent design and concealment on the part of the Spragues; whereby, as is alleged, the complainants were kept in ignorance of their rights and of the state of their property, and the transformations under which it went, until shortly before the filing of the bill.

The defendants severally answered the bills, denying all fraudulent motives and any intentional concealment; averring that they acted according to their best judgment as to what was for the interest of all the parties interested in the estate; insisting upon the legal validity of their proceedings respectively, and especially of the transfer of the minors' interest to the corporations; setting up the laches and acquiescence of the complainants; and pleading the statute of limitations to the relief sought by the bill.

The first question to be determined is the nature of the complainant's rights, with regard to the partnership effects of A. & W. Sprague in 1865, at the time when the property was transferred to the A. & W. Sprague Manufacturing Company.

§ 764. *The rights of surviving partners and of the representatives of a deceased partner respectively.*

At the death of William Sprague, Sen., in 1856, there is no doubt that each party in interest was entitled to call for a liquidation and settlement of the partnership affairs and a division of the surplus property, and had a lien on the entire property and effects for that purpose. In the real estate and corporal chattels they were tenants in common with the surviving partners, and over the entire property, including the credits and other assets they had the lien referred to, which they had a right to enforce at once if the surviving partners refused to make a settlement. These partners had the right of possession, and in the choses in action the right of property to enable them to settle up the concern. But these rights of survivorship were subordinate to the lien of those beneficially interested, who thereby had a right to enforce the due appropriation of the partnership effects.

§ 765. *An administrator may allow his intestate's estate to remain in the firm in which he was a partner. The liability incurred thereby, and the liens respectively of the partnership and subsequent debts.*

But who were the parties beneficially interested in this case? Primarily, the personal representatives of Amasa Sprague, Sen., and William Sprague, Sen., namely, the two widows, Fanny Sprague and Mary Sprague, administratrixes respectively of the estates of Amasa and William. The ultimate beneficiaries could only reach the property through them. If they abused their trust they would be liable to their respective *cestuis que trust*. They had the power, if they saw fit, unless restrained by their beneficiaries, to allow the estates of their deceased intestates to be continued in the business of the partnership; and if it was continued by their allowance and consent, the property became liable to the partnership debts subsequently incurred as well as to prior debts; but with this qualification, that the property which remained unchanged was still subject to the partnership lien in preference to after-incurred debts; whilst new property which, in the course of business, took the place of the old, was not subject to said lien in preference to such debts.

This seems to be the result of the cases, though they are apparently somewhat in conflict. A cursory reading of the opinion in *Skipp v. Harwood* (1747), 2 Swans., 586, and Lord Hardwicke's opinion in the same case on appeal (*West v. Skipp*, 1 Ves. Sen., 239), and the opinions in *Stocken v. Dawson*, 9 Beav., 239, and same case on appeal (17 Law J. Ch., 282), would lead to the

conclusion that the executor's lien in such cases attaches to the whole property, as well that newly acquired as that which remains of what was in existence at the testator's or intestate's decease. But this is inconsistent with the decisions in *Nerot v. Burnand*, 4 Russ., 247, and *Payne v. Hornby*, 25 Beav., 280; S. C., 4 Jur. N. S., 446, which hold that where the business is carried on with the consent of the outgoing partner, or the representative of the deceased partner, debts incurred during that period have a preference over the partnership lien upon all newly acquired property. A comparison of the cases will show that the rule laid down by Lords Hardwicke and Cottenham in *West v. Skipp and Stocken v. Dawson* was applied by them to cases in which the property of the retiring or deceased partner was used in the business against the will, or without the consent, of the persons entitled thereto. The law is laid down with much accuracy in the last edition of *Lindley on Partnership*, pp. 700-702, where it is said: "Whilst the partnership lasts, the lien attaches to everything that can be considered partnership property, and is not therefore lost by the substitution of new stock for old. Further, on the death or bankruptcy of a partner, his lien continues in favor of his representatives or assignees, and does not terminate until his share has been ascertained and provided for by the other partners. But after the partnership is dissolved, the lien is confined to what was partnership property at the time of the dissolution, and does not extend to what may have been subsequently acquired by the persons who continue to carry on the business."

Sir John Romilly, in giving judgment in *Payne v. Hornby*, cited above, after admitting that, by a mortgage of his stock in trade, a man might bind after-acquired property (as to which see *Holroyd v. Marshall*, 10 H. L. Cas., 191), said: "But on the death of a partner the case is altogether different. There is, as Lord Eldon very accurately expresses it, '*a quasi lien*;' there is, in point of fact, only a right to the specific property. The executors of the deceased partner are joint tenants with the surviving partners, and accordingly they are entitled to require the surviving partners to do one of two things,—either to wind up the partnership business at once, or to fix the value of the testator's property and secure payment of the amount. . . . If the executors do not apply for a receiver, but simply file a bill for the winding up of the partnership, I apprehend that the new stock which has been acquired during the time that the business has been carried on by the surviving partner belongs, in the first place, to the creditors who have been created by such subsequent dealings, and not to the creditors of the old partnership; and that it is the duty of the executors, if they wish to prevent any dealings with the stock, to come at once to this court for the appointment of a receiver; otherwise they, in fact, sanction the commission of a fraud, by leading the subsequent creditors to believe that they are dealing with a person who is liable out of his stock in trade to discharge their debts." 4 Jur. N. S., 446.

These remarks of the master of the rolls have respect to the rights of creditors. As between the surviving partners themselves and the representatives of the deceased partner, the lien of the latter will extend to after-acquired property resulting from the employment of the partnership stock, so as to entitle them, at their option, either to demand a share of the profits, or interest on the value of the decedent's share at the time of his death; unless the transactions between them have been such as to indicate a sale of the deceased partner's share to the survivors. A sale, however, can hardly be inferred where no steps have been taken to ascertain the value of the share.

Recurring now to the circumstances of the case before us and the proceedings of the parties, we find that the legal representatives of the deceased partners, and all the beneficiaries of the two estates who were in law capable of acting, entirely acquiesced in, and consented to, the continued employment of the partnership property in the business of the partnership subsequently carried on by the surviving partners; and this state of things continued for the eight or nine years that intervened between the death of William Sprague, Sen., and the transfer of the property to the corporations. And as to the share of the Hoyt children, it was not only consented to by Mary Sprague as administratrix of her deceased husband's estate, but as guardian of the property of the said children.

It seems to have been an understood thing between all the parties, from the beginning, that without any formal settlement of the estates of Amasa and William Sprague, Sen., the several beneficiaries entitled to distribution should be and were considered as interested in the common partnership property in the proportional amount of their beneficial interest. The active partners represented their own respective shares. Mary Sprague as administratrix and as guardian of the Hoyt children represented her own share and theirs. It is objected to her that she omitted to file any inventory or account; but as there was no difficulty or dispute between the parties in interest as to the extent of the several shares, there was no imperative necessity of presenting accounts to the probate court as long as it was deemed expedient to continue all the property in the joint business. An inventory could settle nothing, because the property in which all were equally interested was constantly changing, and an account would have had no practical value, because no immediate settlement of the estate was proposed. The cardinal question, so far as these cases are concerned, was that which related to continuing the shares of the minors in the concern, and keeping the property together. Conceding that to have been the proper course to take, the omission on the part of Mary Sprague to exhibit the accounts prescribed by statute cannot be regarded in the same light as it would have been if she had had possession of the property and was devoting it to her own use. It may have been unwise, but under the circumstances it can furnish no evidence of want of good faith, or a desire to do other than the best that could be done for the interests of her grandchildren and wards.

§ 766. *Permitting his ward's estate to remain invested in a partnership is not necessarily a fraud on the guardian's part.*

And as to the question of fraud we may at once state that we entirely agree with the court below that the case furnishes no evidence to sustain that charge, either as against Mary Sprague or any of the other parties concerned. They may have judged unwisely, but we see no ground for believing that they were actuated by any desire to cheat or defraud the children of Susan Hoyt out of anything that justly belonged to them. We are sure that such a thought could not be attributed to their grandmother, and we have no evidence to believe that it was ever entertained by Amasa Sprague or William Sprague. We must regard the decision of Mrs. Sprague, and of Edwin Hoyt, the father, to keep the property of the children in the concern, as an error of judgment only rather than as the result of any design or intent to defraud. We may well conceive that the supposed wishes of William Sprague, Sen., who by his energy and talent had created the estate, and who had persistently kept it together as a common property for the equal benefit of his brother's family and himself, had great weight with Mrs. Sprague and her son-in-law, as well as with

the surviving partners, in leading them to adopt the conclusion they did. And for many years the result seemed to justify the conclusion to which they came.

§ 767. *A guardian who lets his ward's property remain in a partnership has no lien on the property against subsequent creditors.*

But whatever may have been the responsibility which Mary Sprague, as administratrix and guardian, assumed, it cannot be doubted that she had the power to keep the property in the business, for it was subject to her disposal. And as it was kept in the business by her consent and allowance, she ceased to have a lien upon the property as against subsequent creditors of the concern. And as she in her representative capacity ceased to have such lien, it is difficult to see how the minors themselves, when they arrived at full age, could have any such lien, whatever remedy they may have had against Mary Sprague. If the ultimate beneficiaries of a deceased partner's estate could thus revive a lien which has become extinguished as against creditors, there would be little safety in dealing with commercial partnerships in which any partner has ever died.

This consideration is conclusive against the claim made by the bills to be paid out of the assets in the hands of Chafee, the trustee, in preference to or even *pari passu* with the creditors of the corporation. For where the representative of a deceased partner allows the interest of his decedent to be used in the business by the surviving partner, and thereby loses his lien upon the partnership property, he does not thereby become a creditor of the new firm, and cannot come into concurrence with the creditors thereof; but the property of the firm is first subject to the claims of such creditors, and after they are satisfied the representative's right to have an account against the surviving partner remains as before.

§ 768. *Representatives of deceased partners are liable to their beneficiaries for their deviation from duty in permitting assets to remain in the partnership.*

But whilst the rights of creditors are thus protected against the lien of a deceased partner's representatives, who have consented to the continuance of the business without a settlement, the beneficiaries standing behind those representatives are entitled to call them to an account for the manner in which they have dealt with the estate. And where, as in this case, they depart from the ordinary mode prescribed by law, and expose the property to the hazards of trade, they run the risk of making themselves answerable for any loss that may occur. In the present case, however, we have no evidence that loss occurred during the period under consideration.

The estimated cash value of the minors' share of the property on the 31st of March,

1865, as appeared by the appraisement then made, was.....	\$652,753 68
Allowance to offset family expenses of the other parties.....	188,333 33
Interest in Quindnick property, including E. Hoyt's curtesy.....	116,112 93

Total..... \$957,206 94

As gold was then 150, the specie value of this total would be \$638,137.96. No satisfactory proof has been adduced to show that this amount was not fully equal to what the interest of the minors ought to have been in view of the value of the estate in 1856, at the time of William Sprague, Sen.'s, decease.

Up to the time of organizing the corporations, therefore, and the transfer of the property thereto, we have no evidence that any loss or diminution of value had occurred. Still, if the matter stood there, the defendants, or at least Mary Sprague, might be called upon to render an account, and to show by affirmative proof that all the property which came into her hands as ad-

ministratrix, or guardian, for the use and benefit of her daughter Susan's children, was forthcoming and ready to be paid over to them. It is necessary, therefore, to take into view what occurred in 1865 and afterwards, in relation to the disposition made of the property to the corporations before referred to, and to the conduct of the complainants after coming of age, in order to determine whether they are entitled to any portion of the relief sought by the bills.

It is contended by the defendants that the authority given to Mary Sprague, as guardian of the Hoyt children, by the joint resolution of 1863, to transfer all the property of her wards to the corporations indicated, was a complete justification for her acts in that behalf; and releases her from all further obligation except that of accounting for the shares of capital stock received therefor and any dividends accruing thereon whilst in her possession.

It is contended by the defendants, secondly, that the complainants, after coming of age, had so long acquiesced in the arrangements made in 1865, before bringing suit or taking any steps to set them aside, that they are now precluded by their own laches and by the lapse of time from having the relief which they seek.

§ 769. *A state legislature may pass special laws directing the investment or sale of the estates of infants.*

As to the first point, it seems to be beyond doubt, that if the legislature had the power to pass the resolution referred to, it was a complete authority and justification for the conveyance by Mrs. Sprague of the interests of her wards to the corporations mentioned. The resolution itself is sufficiently broad to give the requisite authority. The question is as to the legislative power.

With regard to the general legislative power of a state to act upon persons and property within the limits of its own territory there can be no doubt. Mr. Justice Story lays down three fundamental rules on the subject of private international law, the first of which is expressed thus: "I. The first and most general maxim or proposition is that which has been already adverted to, that every nation possesses an exclusive sovereignty and jurisdiction within its own territory." And he adds, "The direct consequence of this rule is, that the laws of every state affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it, whether natural-born subjects or aliens, and also all contracts made and acts done within it." The second rule declares that no state or nation can, by its laws, directly affect or bind property out of its own territory, or persons not resident therein. The third is, that whatever force and obligation the laws of one country have in another depend solely upon the laws of the latter, that is, upon the comity exercised by it. Story, *Conflict of Laws*, secs. 18-23.

§ 770. *Rules of comity with reference to foreign guardians stated.*

One of the ordinary rules of comity exercised by some European states is to acknowledge the authority and power of foreign guardians, that is, guardians of minors and others appointed under the laws of their domicile in other states. But this rule of comity does not prevail to the same extent in England and the United States. In regard to real estate it is entirely disallowed; and is rarely admitted in regard to personal property. Justice Story, speaking of a decision which favored the extraterritorial power of a guardian in reference to personal property, says: "It has certainly not received any sanction in America, in the states acting under the jurisprudence of the common law. The rights and powers of guardians are considered as strictly local; and not as en-

titling them to exercise any authority over the person or personal property of their wards in other states, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators." Story, Conf. Laws, secs. 499, 504, 504a. And see Wharton, Conf. Laws, secs. 259-268, 2d ed.; 3 Burge, Colon. and For. Laws, 1011. And some of those foreign jurists who contend most strongly for the general application of the ward's *lex domicilii* admit that, when it comes to the alienation of foreign assets, an exception is to be made in favor of the jurisdiction within which the property is situate, for the reason that this concerns the ward's property, and not his person. Wharton, secs. 267, 268.

But whilst the English and American law require a guardianship where the property is situated, it is conceded that, in the due exercise of comity, preference would ordinarily be given to the person already clothed with the authority of guardian in the minor's own country. Phillimore, vol. iv, 381; Wharton, sec. 266. In the case before us it does not appear that the minors had any other guardian in New York than their natural guardian, Edwin Hoyt, who applied for the appointment of Mary Sprague as guardian of their estate in Rhode Island.

§ 771. *The state in which property is situated can appoint guardians for infant owners although they may be non-residents.*

As the question before us is one of power and not of comity, we think there can be no doubt that the legislature of Rhode Island, where the property was situate, had power, first, to pass laws for the appointment of guardians of the property of non-resident infants, situate in that state; and, secondly, it had power to prescribe the manner in which such guardians shall perform their duties as regards the care, management, investment and disposal of such property; and that this power is as full and complete as where the minors are domiciled in the state.

Not only did the power exist, but we find that it was exercised. The laws of Rhode Island gave explicit power to the probate court to appoint a guardian of the property of non-resident infants. The act of October 31, 1844, declared that "the courts of probate of the several towns are hereby authorized and empowered to appoint guardians, when occasion shall require, over the property or estate of persons who reside out of the state and possess property therein." The previous act of January 6, 1837, had authorized the same courts, in case of incapacity of parents of any minors, or for other sufficient cause, to appoint a guardian of the property of such minors, without connecting therewith the guardianship of such minors' persons.

§ 772. *Appointment of a guardian is not peculiarly an exercise of chancery powers.*

There is no force in the objection made to these laws, that they give chancery powers to the probate court, contrary, as contended, to section 2 of article 10 of the constitution of Rhode Island, adopted in 1843, which says: "Chancery powers may be conferred on the supreme court, but on no other court to any greater extent than is now provided by law." The answer to this objection is obvious. The appointment of guardians is not, and never has been, peculiarly a chancery power. Guardians at common law became such by their relation to the minor, without any judicial appointment. Guardians were also appointed by testament by the father of any minor from time immemorial in the province of York, and on failure to thus appoint, the ordinary had the power of appointment. Swinburne on Wills, 282. In this country the power

to appoint guardians and to pass upon their accounts has generally by statute been conferred upon the probate courts. In Rhode Island the power was exercised by these courts long before the constitution of 1843 was adopted.

Assuming, then, that the probate court had the power to make the appointment, we have been unable to see anything informal or improper in the appointment of Mary Sprague as the guardian of her infant grandchildren. The petition for her appointment was made by the most suitable persons in the world,—their father, Edwin Hoyt, and Byron Sprague, their mother's only brother.

It is true, as suggested, that the duties of Mary Sprague as administratrix might clash with her duties as guardian; but this was not a necessary consequence. The same person is often appointed executor of a will and guardian of the testator's children. It is seldom that any practical difficulty arises from the joinder of the two capacities. We do not perceive that their joinder in the present case had, or was likely to have, any deleterious effect upon the interests of the infants concerned. At all events, it did not avoid or vitiate the appointment.

The guardian having been duly appointed, and no deterioration of the estate being shown prior to the conveyance to the corporations, the next inquiry relates to the authority for making such conveyance, given by the joint resolution of 1863. As already intimated, it cannot be doubted that the legislative power extends to the regulation of the investments and the management of minors' estates by their guardians. The legislature certainly might, if it saw fit, pass a general law authorizing a guardian to invest the property of his ward in the capital stock of a corporation engaged in manufacturing, trading or financial operations, or in a particular class of operations, as banking, insurance, or any other that might be specified. Usually, such authority, if given, would be required to be exercised under the allowance and supervision of a court; but that would be a matter of legislative discretion. That such an authority could be conferred by law there can be no doubt. Analogous powers have been conferred from time immemorial.

§ 773. *The act of a legislature authorizing a guardian to make a particular investment of his ward's estate is not a judicial act nor beyond the legislative powers.*

But it is objected that the resolution of March 9, 1863, under which the guardian in this case derived her authority to make the investment under consideration, was not a legislative, but a judicial, act, and beyond the legislative power.

The only provision in the constitution of Rhode Island which bears upon this question is the usual one which distributes the powers of government into three departments, legislative, executive and judicial, and assigns to each the powers appropriate to it. Thus, "The legislative power shall be vested in two houses," etc. "The judicial power shall be vested in one supreme court, and in such inferior courts as the general assembly may, from time to time, ordain and establish."

The question of the power of a legislature, when not restrained by a specific constitutional provision, to pass special laws, has been much mooted in the courts of this country; and it would subserve no useful purpose to go over the whole ground of controversy on this occasion. Suffice it to say that laws of this character, for the purpose of healing defects, giving relief, aid and authority in cases beyond the force of existing law, have been frequently passed

in almost every state in the Union, and have received the sanction not only of this court, but of other courts of high authority. The exercise of this power has been most conspicuous in that class of cases in which the legislature has been called upon to act as *parens patriæ* on behalf of lunatics, minors and other incapacitated persons. Laws authorizing the sale of the estates of such persons have frequently been passed, and have been upheld as fairly within the legislative power. The passage of such laws is not the exercise of judicial power, although, by general laws, the discretion to pass upon such cases might be confided to the courts. But when it is not confided to the courts, the power exercised is of a legislative character, the legislature making a law for the particular case. In some modern constitutions the exercise of this power has been prohibited to the legislative department. But where not so prohibited, and where it has never been authoritatively condemned in the jurisprudence of the state, we cannot deny to the legislature the right to exercise it in those cases in which it has been accustomed to be exercised, amongst which we think the present case may be fairly reckoned. Such laws are not judgments upon any person's rights, but they confer powers upon the exercise of which judgment may afterwards be given.

§ 774. *Cases cited.*

The only cases in Rhode Island decided since the adoption of the constitution of 1843, which have been cited as having a bearing on the subject, are *Taylor v. Place*, 4 R. I., 324, and *Thurston v. Thurston*, 6 id., 296. The general conclusion to be derived from these cases is favorable to the view we have taken.

In the first of these cases, the legislature having passed a vote for opening a judgment, allowing new affidavits to be filed on the ground of accident and mistake, setting aside a verdict and granting a new trial, the court very properly held this to be an exercise of judicial power, and declared the vote to be void. But they distinguished the case from those laws passed to confer special powers upon executors, etc., as in *Watkins v. Holman*, 16 Pet., 25, where an act authorizing an administratrix residing in another state to sell land in Alabama for the purpose of paying debts was held by this court to be within the legislative power and valid. In the other case cited (*Thurston v. Thurston*), the court held that it was beyond the power of the court of chancery in that particular case to decree a sale of infants' lands; that the power, if possessed by any court, was vested by statute in the probate court; but added: "If a case should arise within the spirit, though not within the letter, of such or a similar statute, a special authority to a trustee to convert the real estate of his infant, lunatic, or otherwise incapable *cestui*, would seem to partake, as intimated by this court in *Taylor v. Place*, more of a legislative than of a judicial character, and would be, having been long exercised and not prohibited by the constitution, within the constitutional competence of the general assembly. *Watkins v. Holman*, 16 Pet., 25; *Davis v. Johonnot*, 7 Met., 388; *Snowhill v. Snowhill*, 2 Green, Ch., 20; *Norris v. Clymer*, 2 Barr, 277; *Spotswood v. Pendleton*, 4 Call, 514; *Dorsey v. Gilbert*, 11 Gill & Johns., 87." This is certainly a very clear intimation of the constitutionality of the class of laws to which that now under consideration belongs.

§ 775. *The form of acts prescribed by the constitution of Rhode Island is directory and not essential.*

But another objection made to the validity of the joint resolution is that it was not in proper form, in not being preceded by the proper enacting clause.

The constitution declares that the style of the laws shall be: "It is enacted by the general assembly as follows." If this requirement is anything more than directory, it cannot be decreed to apply to that species of enactments which are usually denominated joint resolutions, and which are often used to express the legislative will in cases not requiring a general law. The practice of the congress of the United States, and of almost every legislative body in the country, may be adduced to show that a resolution of the nature now under consideration could not have been within the intent of the provision referred to.

It is unnecessary to enter upon a particular review of the proceedings taken by the parties to effect a transfer of the partnership estate to the corporations chartered for that purpose. We have given them our careful attention, and are satisfied that they were substantially regular. We have no doubt of the guardian's power to submit to referees the ascertainment of the value of the minors' interest in the property; nor of the binding effect of the award made by the referees. Our conclusion is that the guardian, Mrs. Mary Sprague, had full power and authority to invest the said interest in the capital stocks of the corporations referred to; and that having done so, she was no further answerable therefor, but only answerable for the shares of capital stock and the dividends realized thereon, respecting which we do not understand that any complaint is made.

§ 776. *Acquiescence by an infant for seven years after becoming sui juris precludes all complaint of irregularity in the management of his estate by his guardian.*

But aside from the legality and binding effect of the proceedings for investing the minors' interest, as here stated, the acquiescence of the complainants, after they came of age, effectually precludes them from obtaining the relief sought by their respective bills. The bills were not filed until June and July, 1875, in the one case nearly nine years, and in the other more than seven years after the minors became *sui juris*, and could have known, if they did not know, the exact position and history of their property. Notwithstanding all the asseverations to the contrary, the evidence fails to show that they were not allowed every opportunity of which they chose to avail themselves, of obtaining this knowledge. And the fact is clearly demonstrated that they did have sufficient knowledge to leave them without any excuse for lying by and giving no sign of dissatisfaction. For several years they received regular annual accounts. These accounts showed the character of the property, and in what it consisted. It further appears that in 1870 each of the complainants received from the book-keeper in Rhode Island a list of all the stocks and securities in which they were respectively interested. It also appears that they accepted the stock of the Quidnick Company, and they make no complaint of that part of the settlement.

Without further discussion, it suffices to say that the complainants came into the court too late to obtain relief, even if when they came of age they could have justly complained of the conversion of their property into the stock of the corporations. In such cases, it is not merely a question as to what information respecting their rights parties do actually obtain; but as to what information they might have obtained had they used the means and opportunities directly at their command. Others, acting in good faith, also have rights; the world must move; and it is the interest of the community that controversies should have an end.

Decree affirmed.

MICOU v. NATIONAL BANK.

(14 Otto, 530-547. 1881.)

APPEAL from U. S. Circuit Court, Middle District of Alabama.

Opinion by MR. JUSTICE MATTHEWS.

STATEMENT OF FACTS.—This is a bill in equity, filed by the First National Bank of Montgomery, to subject to the payment of a judgment recovered by it against Benjamin H. Micou, Thomas M. Barnett and Nicholas D. Barnett, partners as Barnett, Micou & Co., certain lands the legal title to which had been transferred to Henry C. Semple, in trust for Lucy B. Micou, and Clara E. Boykin, wife of Frank S. Boykin, all of whom, together with Benjamin H. Micou were defendants below, the conveyance being, as charged, in fraud of the complainant's rights as a creditor.

The indebtedness on which the judgment is founded existed at the time of the occurrence of the transactions which form the subject of the controversy.

§ 777. *Circumstances under which the purchase of a guardian's property for the account and benefit of his wards is not fraudulent and void although he be insolvent.*

The fraud charged in the bill is that Benjamin H. Micou, being at the time guardian in the probate court of Tallapoosa county, Alabama, of his daughters Clara E. Boykin and Lucy B. Micou, confederated and colluded with them and with Frank S. Boykin, husband of Clara, to procure judgments and decrees to be entered up against himself by said probate court in the matter of said guardianships, and to have all of his property liable to sale under legal process, except such personal property as they might aid him to fraudulently convert to his own use, and excepting some property bought by another creditor, sold and transferred to his said daughters, with the intent on the part of all of said parties thereby to hinder, delay and defraud the creditors of the said Benjamin H. Micou, he being at the time insolvent.

By virtue of this conspiracy it is alleged that settlements and decrees were caused to be made in said probate court, whereby it was falsely and fraudulently made to appear that on February 10, 1874, the said Benjamin H. Micou was indebted to Clara E. in the sum of \$88,300, for which sum a decree was rendered in said court in favor of Clara and her husband against him; and that on February 24, 1874, said Micou was indebted to Lucy B. in the sum of \$88,031.77, for which sum a decree was rendered in said court in her favor. Copies of the proceedings in the probate court are exhibited. At the time of the settlement with her, Lucy was a minor over the age of nineteen years.

It is charged in the bill that in making said settlements Micou "did not contend for or desire fair and proper settlements, and that there was no real effort on his part to introduce, as he had it in his power to do, or inform his attorney of evidence to show that he was not, as your orator avers he was not, chargeable with the amounts and sums he permitted to be found against him by collusion" with his daughter and son-in-law.

The bill further states as follows: "Orator is without any means of showing in this bill the particular items and amounts improperly and collusively charged against said Benjamin H. Micou, and items for which he should have received credit in such settlements, further than is herein shown, the facts upon which said settlements ought to have been made being peculiarly within the knowledge of said B. H. Micou and the other defendants hereto and not of your orator; but orator charges that the item of \$91,648.95 with which the said

Benjamin H. allowed his account to be surcharged on said settlement was not, and was known to the said Benjamin H. and to the said Clara E., Frank S. and Lucy B., not to be, legally and justly due from him; that each item of negro hire, of which said sum is partly made up, was, if said Benjamin H. was rightly chargeable with any part thereof, charged at too high a rate, and that said sum of \$94,799.95 was too much by a large sum of, to wit, \$50,000, and that this could have been shown to the court by testimony, if he, the said Benjamin H., had desired to make a fair and valid settlement.

"Orator further charges that said Benjamin H. was not, and he and his said daughters then well knew that he was not, chargeable with the large sums or any part thereof, shown in Exhibit A and B to have been charged against him for negro hire and land rent, for that, as orator charges, the said B. H. Micou was, by orders of said probate court, made as shown by the full and true copies thereof hereto attached and marked Exhibit D, and prayed to be taken as part of this bill of complaint, authorized to keep his said daughters' property together, and he was only liable to account for the profits arising from the same, which were small."

The decrees referred to were rendered in February, 1874, and by the law of Alabama (Code of Ala., sec. 2794) it is provided that "all final decrees against guardians have the force and effect of judgments at law, upon which execution may issue against them and the securities on their bonds."

The two brothers Barnett, who were partners of Micou, were also his brothers-in-law, uncles of Clara E. and Lucy, his daughters and wards, and were sureties on his bond as their guardian. The decree in favor of Lucy, who at the time of its rendition was still under age, was rendered in the name of H. A. Garrett, who had been appointed her guardian *ad litem* for that purpose.

Executions were issued upon both decrees to the sheriff of Montgomery county, who also at the same time held some other executions against the same defendants, under which all the real estate belonging to the Barnetts and Micou were sold, and conveyed by the sheriff to Henry C. Semple, who was the attorney for Lucy B. and Clara E. and her husband, except one parcel bought in by one Pittman, plaintiff in one of the other executions, under an arrangement made with him by Semple on behalf of his clients. Each of the executions in favor of Mrs. Boykin and Lucy B. Micou was credited with \$49,540.36 as the proceeds of these sales.

Executions were also issued upon the decrees to the sheriff of Macon county, where Benjamin H. Micou owned a plantation, which he cultivated, and on which, it is alleged, there was a large amount of personal property belonging to him, consisting of a crop of corn, cotton, grain and plantation tools. The executions first issued to this county, it is charged, were returned without levy upon the personal property, under instructions from the plaintiffs to that effect, in order to enable Micou to dispose of it otherwise, which it is averred he did, and thereafter a levy was made on the real estate, which was sold and conveyed to Micou himself as trustee. These lands, it is charged, were worth \$6,000, but were sold for \$1,250.

Executions on the decree were likewise issued to Elmore county, under which real estate belonging to Micou, and also to the Barnetts, was sold to Semple. It is charged that there was a large amount of personal property belonging to the defendants on these lands, which was not levied on, in order that the defendants might convert it to their own use by some other disposition. And it is charged in the bill "that since the rendition of said decrees

there has been a complete understanding and agreement between the parties to said executions that the plaintiffs therein should so use said decrees, and process to be issued thereunder, as to enable the defendants therein to hinder, defraud and delay their several creditors, in that they were to be permitted and aided in converting property to their own use," as therein shown; and that in further pursuance thereof, notwithstanding the sales of the real estate, the defendants in the executions have been permitted to remain in possession thereof for their own use.

The Barnetts were not made parties to the bill, and no relief is prayed against them.

It is also charged in the bill that Semple holds the legal title to the property conveyed to him under the sales on execution upon some secret trust, in which the Barnetts and Micou have, by agreement, some beneficial interest.

It is also alleged that, at the time of the settlement of the accounts in the probate court, Lucy B. was a minor over the age of nineteen years, but that her disability of nonage had been removed by a special proceeding for that purpose under a statute of Alabama; but these proceedings, a transcript of which is exhibited with the bill, show that the decree of the chancery court removing her disability was not rendered until June, 1874, although the petition therefor was filed in May, 1873; and, in point of fact, the settlement by Micou of his account as her guardian was made, as appears by the proceedings in the probate court, on his resignation of his guardianship, accepted of record on January 26, 1874, and was effected by the appointment of Garrett as her guardian *ad litem*, in the matter of the settlement.

In his petition to the chancery court, praying for the removal of the disability of nonage in respect to Lucy, her father states as reasons for the relief, as follows: "Said minor is possessed in her own right of a considerable estate, real and personal, and a large part of said personal estate consists of demands against petitioner, which he is now ready and willing to settle and account for; said minor is a young lady of at least average intelligence and more than ordinary education and acquirements, and is, perhaps, as competent now to manage her own affairs as she ever will be. Your petitioner is at this time able and willing to settle all her demands against him. But inasmuch as he is engaged in commercial and manufacturing pursuits, and as the result of such pursuits is proverbially uncertain, petitioner may by adverse fortune be deprived of the means of making such full settlement after said minor arrives at the age of twenty-one years; and petitioner further states that Thomas M. Barnett and Nicholas D. Barnett, the sureties of petitioner on his bond as guardian, are engaged in the same pursuits as himself, and liable to the same disaster," etc.

In point of fact, at and previous to that time Benjamin H. Micou was, and had been, president and managing agent of the Tallassee Manufacturing Company No. 1, doing a large business, with its office in Montgomery, Ala., and in which he and the Barnetts were largely interested as the principal stockholders. The firm of Barnett, Micou & Co. had in the fall of 1873 lent its credit to said manufacturing company to the extent, it is alleged, of \$300,000, at which time, it is also alleged, that company had become embarrassed, and in December, 1873, suspended payment. It is also charged that the firm of Barnett, Micou & Co., and its individual members, were largely indebted on other accounts, in excess of the value of their property subject to levy and sale under process, which, it is alleged, was not greater than \$175,000.

Clara E. Micou intermarried with Frank S. Boykin July 10, 1873, shortly after which, it is alleged, and before the settlement with her, as guardian, in the probate court, her father transferred to her in payment of that sum on account of what was due to her from him \$30,000 in the capital stock of the Tallassee Company, but omitted the same from his account in the settlement in pursuance of the fraudulent purpose already charged.

Answers under oath are required from the defendants, and numerous special interrogatories covering the whole scope of the bill are addressed to them.

The account of Benjamin H. Micou, as guardian of his daughters, as filed by him in the probate court for settlement January 13, 1874, is exhibited with the bill. This account begins with a balance to the debit of the guardian, as ascertained on a former settlement by the probate court in 1859, which, with interest, amounts to over \$20,000, and includes cash items, being amounts received for them as distributees of the estates of T. M. Barnett, Sen., their mother's father, and of the estate of their mother, which, with interest, amount to about \$70,000; and the other items consisting of sums received on account of the income arising from their property; but no income is allowed them for the years 1862, 1863, 1864 and 1865, on the ground that none was received; and the guardian charges himself with rent for their real estate from 1866 to 1873, rented by himself, at the rate of \$1,000 per annum. The balance admitted by the guardian to be due to the two wards is \$107,430.52.

That this account was rendered in good faith, and that there was due at the time from Benjamin H. Micou to his wards at least as much as the balance shown by it, are facts not questioned by the bill, but admitted — if not expressly, by necessary implication — to be true. Indeed the very fraud charged and relied on, as constituting the ground of the relief prayed for, is that the parties did not abide by this account.

It appears, however, by the transcript of the proceedings in the probate court that Mrs. Clara E. Boykin, by her attorney, Elmore J. Fitzpatrick, objected to the allowance of certain items in the account as filed, and it is recited that "the court, having listened to the argument of counsel, and heard the testimony offered in support of the said objections, decided and ordered" that the guardian be charged with certain enumerated items. They consisted of amounts charged against him as hire of slaves for the years 1859 to 1865, both inclusive, and also rents for land during the same period, and surcharging the account for rents from 1866 to 1873, and readjusting the account in some other particulars, striking out the items of debit for proceeds of cotton, and disallowing certain items of credit. The final result was to credit the guardian with sums in the aggregate amounting to \$22,261.98, and charge him with sums amounting to \$92,553.95. The balance against him, after allowing for an error in making the addition, was thus increased in the sum of \$76,291.08, making the final balance against him the sum of \$185,967.60, of which, after deducting costs and commissions, Mrs. Boykin was entitled to one-half, being \$88,300. For that amount judgment was rendered in her favor February 10, 1874, with an order for an execution thereon against the guardian and his sureties.

The account of the guardian with his daughters was kept jointly, as their interests in the property had never been separated; and similar proceedings in the settlement with his daughter Lucy resulted on February 24, 1874, in a judgment for the sum of \$88,031.77, in favor of Henry A. Garrett for her use, he having been appointed her guardian *ad litem*, to represent her in the settlement.

The accounts as originally filed by the guardian are based upon the principle of crediting the wards with the net proceeds of the operation of their plantations, carried on for them by their father, while the accounts as settled by the probate court charge him with the risks and losses of the business as carried on, requiring him to account as if he had rented the plantations and hired the slaves for his own use, at such sums as he might have obtained from others.

It seems not to be denied that the latter, under the laws of Alabama, was a proper mode and basis of settlement, unless the guardian could show some previous special authority for carrying on the operations of the plantation in the name and at the risk of his wards.

In the settlement of Micou's accounts it was claimed on his behalf, and as a justification of his account as filed by himself, that such special authority existed; and to prove this there was produced an order of the probate court of Tallapoosa county, dated July 18, 1859, which, it was claimed, contained such authority. It appears from a copy of that order exhibited with the bill, that on November 22, 1858, Benjamin H. Micou, as guardian of his daughters, filed a petition, setting forth that it was to the interest of said minors that the slaves belonging to them be kept together and worked on a plantation instead of hired out, and that for said purposes it was necessary to purchase a plantation on which to work said slaves, and to the interest of said minors so to do; suggesting that he had contracted for the purchase of a described tract for the purpose aforesaid, and praying for an order authorizing him to purchase and pay for the same. The probate judge accordingly appointed commissioners to report as to the value of the lands and the necessity of the purchase. On December 20, 1858, another order was entered, reciting the report of the commissioners in favor of the purchase for the purpose and at the price named; and "it appearing to the court from the report of said commissioners, and from legal and proper evidence, that it is to the interest of said minors that said slaves should be kept together and worked on a plantation, and that the purchase of the above described plantation is a necessary one," etc., it was therefore "ordered, adjudged and decreed by the court that the said Benjamin H. Micou do forthwith proceed and purchase said lands or plantation above described, at the price or sum aforesaid, for the use and benefit of the said minors," etc., and "it is further ordered that when said guardian shall have perfected said purchase, and received titles for said land, he report the same to this court."

On June 23, 1859, the guardian made report of the authorized purchase and of the payment of the price, and that a title had been made to the lands. This report was approved and confirmed by an order of the court made July 18, 1859. But it does not appear that any further order was made by the court, directing or authorizing the guardian to keep the slaves of his wards together and work them on their plantation at their risk and expense, instead of hiring them out and renting the lands. And the probate court decided, in the matter of the final settlement of his accounts, that the order to purchase the additional land of December 20, 1858, relied on as authority for so doing, did not have such effect; and the judge accordingly adjusted the account and found the balance due on the principle stated.

This judgment is attacked by the complainant below as collusive and fraudulent, and the right to the relief sought rests upon that charge.

The prayer of the bill is that the decrees of the probate court establishing these balances as due from Benjamin H. Micou, as guardian to his daughters respectively, together with all proceedings, executions and sales under them of

the property of Benjamin H. Micou, be declared to be null and void, and that the lands of Micou sold under them be subjected to the payment of the debt due to the complainant, and for general relief.

As required, the defendants answered severally, under oath, and specifically deny every allegation of the bill charging fraud and conspiracy. These answers are supported by the testimony of the parties, taken on their own behalf in the cause.

The principal defendant, Benjamin H. Micou, in his answer, states that soon after his daughter Clara, afterwards Mrs. Boykin, became of age, "he commenced to make preparation for settling the whole of his account with his two daughters of his guardianship of their property, and in the spring of 1873 he collected up his accounts and vouchers in regard to his management of their estate and placed them in the hands of his attorney, David I. Blakey, and directed him to make out a full and correct account for settlement of said guardianship; and as he desired to be relieved of the responsibility of said trust entirely, and his other daughter, Lucy, was nearly of age, he, at the same time, instructed his said attorney to prepare a petition to the chancery court of Elmore county, praying to have said Lucy relieved from the disabilities of minority, so that he might settle at the same time with both of his said wards; that he failed to procure a decree at the June term of said chancery court of Elmore county, and on account of bad health and absence from the city of Montgomery, and state of Alabama, during most of the summer of 1873, was unable to furnish his attorney with the information necessary from time to time to enable said attorney to properly prepare said account; the said settlement was further delayed by the breaking out of yellow fever in Montgomery in the fall of 1873 and by the financial panic, which occupied the whole of respondent's attention and compelled him to give the whole of his time to the management of the affairs of the Tallassee Manufacturing Company, to the exclusion of his private business, so that he was unable to take up the matter of the settlement of his guardianship until after his connection with the Tallassee Manufacturing Company ceased, in January, 1874, and that in making said settlements he did not consult or confer with said Clara or Frank Boykin or Lucy Micou, and did not give to his attorney any instructions to make out any different account from the one ordered to be made in the spring of 1873, when respondent believed himself to be a rich man and amply able to pay all his debts; and respondent is informed by his said attorney, and believes and so states, that the account filed by him for settlement of his guardianship in the probate court of Tallapoosa county is substantially the same that was prepared by his said attorney in the summer of 1873."

This statement is inconsistent with the supposition that the settlement of his accounts as guardian was prompted by any belief in the imminency of his insolvency. And that it was not so is corroborated by the circumstances of a transaction charged in the bill as one of the evidences of the fraud alleged against him. It appears that about the time of the marriage of his daughter Clara, which occurred in July, 1873, he gave her certificates of shares of the capital stock of the Tallassee Manufacturing Company to the amount of \$30,000 in payment of that amount of his indebtedness to her as her guardian. She gave a receipt for it at the time; but soon after, upon its being made known to her husband, and on the advice of counsel, the transaction was canceled, as one that he could not insist upon. The omission to charge this as a payment in his account is alleged against him as proof of fraud. But if at

this time he was aware of his own insolvency and that of the manufacturing company, the fraud attempted was against and not in favor of his daughter. No such uncharitable view of his conduct has been entertained in any quarter. The more reasonable and probable supposition is, that at the time he hoped to support his credit, preserve his business, save his property and pay his debts, and thus maintain the value of the property transferred to his daughter. The circumstances which induced the cancellation of the transaction altogether preclude the supposition of an intention to perpetrate a fraud upon the complainant.

Mr. Micou states further in his answer, "that at the time he filed his account for settlement in said probate court, he did not think he was liable for the rents and negro hires afterwards charged against him, because he believed that an order had been made by the probate court of Tallapoosa directing said estate to be kept together, and so informed his attorney; and, therefore, his account was made out on the basis of charging himself only with the real profits derived from the cultivation of the plantation purchased for said wards, after deducting the plantation expenses and the expense of stocking said plantation with mules, utensils and other stock; and respondent had no knowledge that any effort would be made to charge him with the said hires and rents until the question came up in the probate court of Tallapoosa county, on the said settlement, when Elmore J. Fitzpatrick, representing the interest of said wards, contended that the order which defendant had always understood to be an order to keep the said wards' estate together was in fact an order only to buy a plantation, and insisted on his right to charge defendant with rents and hires. Respondent's attorney, acting under his instructions, resisted said claim and argued the question of the proper interpretation of said order to the said probate court, but the court decided that respondent should be charged with rents and hires."

That this litigation was adverse and *bona fide* is testified to, also, by Blakey, the attorney for the guardian, and by Fitzpatrick, the attorney for the wards, and by Semple, the regular attorney of the latter, and for whom Fitzpatrick acted as a substitute on the occasion. They severally deny that there was any collusion or understanding or concert of any kind between them or with their clients in reference to the matter. If in point of fact there was any such collusive agreement, and a feigned contest in pursuance of it, these witnesses must have known it, for they were the instruments through whom alone, together with the judge, it was effectuated; and there is nothing in the case that warrants the alternative of rejecting their testimony as untrustworthy.

Some expressions in the deposition of Sturdevant, the probate judge, are referred to in argument as indicating that the contest before him was not earnest; such as that Blakey, the attorney for Micou, after a short argument in opposition to the contention of Fitzpatrick, "yielded the point;" but he distinctly and clearly states the issue between them, and the grounds of it. He says that "the whole question turned upon the fact that there was no authority given to Micou to keep the estate together and to run the farm;" that he decided that there was no such authority, and that the account was settled upon that basis. There is no intimation that this judge was privy or party to the fraud charged against Micou, nor is it claimed that any fraud in procuring the judgment was practiced by the parties or their attorneys upon him. A legitimate question was in fact submitted to him, and the responsibility of properly deciding it was distinctly imposed upon him by the law and the act of the

parties. He rendered his decrees, and, we have no doubt, in perfect good faith; whether correctly or otherwise is not a question that can be made in this case. There is certainly nothing in their nature, nor in the estimate of values contained in them, to justify the inference that the judge was moved by any illegal or improper influences. Indeed, we are not referred by counsel to any principle or authority in the law of Alabama to show that, under the circumstances in proof before the probate court, the judge ought to have come to any different decision. But it is enough for the purposes of this case to find as we do, that there was no fraud in the settlements and decrees on the part of either guardian or wards.

There being a failure of proof of the principal fact alleged — the *corpus delicti* — all the circumstances of suspicion that are arrayed as evidential lose their significance. That Micou was insolvent, and chose to prefer his daughters, to the extent to which they were his creditors as his wards, and furnished them an opportunity by means of a settlement made in good faith, and established by the decree of a competent court, to subject his individual property to their payment in preference to the complainant and other creditors of the partnership of which he was a member, may well be admitted to be sufficiently proven. But it is all that remains, and must be admitted at the same time to be fully sanctioned by the law of Alabama. The statute of that state, which is invoked as the ground of the relief prayed for in the bill, prescribes that "all conveyances or assignments, in writing or otherwise, of any estate or interest in real or personal property, and every charge upon the same made with intent to hinder, delay or defraud creditors, purchasers, or other persons of their lawful suits, damages, forfeitures, debts or demands; and every bond or other evidence of debt given, suit commenced, decree or judgment suffered with a like intent, against the persons who are or may be so hindered, delayed or defrauded, their heirs, personal representatives and assigns, are void." Nevertheless, it is equally true, as it is expressly admitted in argument, that by the law of that state a debtor has the right to prefer one creditor over another, although such preference may leave the debtor without the means of paying his other debts. And thus conferring upon an insolvent debtor the right of absolute choice among his creditors, the law does not require one who is at the same time father and guardian to discriminate against his own flesh and blood, to whom he is indebted as their trustee.

Even the bankrupt law, which was then in force, and might have been invoked, for aught that appears in this record, by the complainant, to prevent the preference of which it complains, as a fraud upon it, assigns to the debt due from Micou to his daughters, as their guardian, a superior quality to that belonging to the claims of ordinary creditors; for his discharge in bankruptcy would not have released him from his legal obligation to his wards. And even had the distribution of his property, both that belonging to him individually and that of the partnership of Barnett, Micou & Co., been made under proceedings in bankruptcy, the very preference secured to his daughters by the decrees of the probate court would, under the circumstances of the case, have still resulted. For in that case the individual property of the partners would have been first applied to pay in full all their individual debts; leaving to the partnership creditors, such as the present complainant, the partnership assets, and only the surplus of the individual property of the partners. This was precisely what took place under the proceedings in question.

It is alleged in the bill, and urged in argument, that after the decrees were

obtained, the executions issued, which eventuated in the sales of real estate to Semple, were handled so as to hinder and obstruct other creditors in the collection of their debts, by covering crops and other personal property from levy and sale; but we have been unable to discover from the record any evidence in support of the charge; and the circumstance that the debtors, after the sales, were not turned promptly out of possession is not, in our opinion, any ground of complaint on the part of other creditors, who show no right to disturb the sale itself. The same remark equally applies to the trust under which, by agreement with his clients, Semple holds the title acquired by the purchases under the executions. It appears from the answer of Mr. Semple, that, on April 4, 1874, after the decrees had been rendered against Micou, as guardian, and the Barnetts as his sureties, Clara and Francis Boykin and Lucy Micou assigned the same to Semple, with the right to control, manage and collect them; upon trust, nevertheless, to proceed so as to secure to Clara and Lucy the title to certain described portions of the real and personal estate, to be sold under execution and purchased in by him to that end, and upon the further trust to purchase as much of the remainder of the property held and owned by the defendants in the decrees, respectively, as could be sold under said executions and purchased therewith, and to settle that part of it owned by Benjamin H. Micou, and sold as his, on his present wife and her children, and to settle that part of it so purchased, which may be sold as the property of Thomas H. Barnett, on his wife and children, and that sold as the property of N. D. Barnett, on his wife and children, but in the two last cases subject to certain charges specified for the payment of money to Clara and Lucy.

There is no proof whatever that it was in view of this or any similar arrangement that the settlements and decrees in the probate court were had, or that any such arrangement was then contemplated by any one of the parties. The contrary is proven by the oath of Mr. Semple, who testifies that it was purely voluntary on the part of Boykin and his wife and Lucy Micou, without any consideration from Benjamin H. Micou or the Barnetts, and suggested for the first time, and by himself, to them, after the decrees had been rendered, as a suitable thing to be done. The grounds on which he proceeded in his persuasions to his clients can best be told in his own words. He says:

"After the rendition of the decrees I saw Francis Boykin and talked with him as a friend as well as his attorney; his father and mother were old friends of my youth, and I had known him since he was a child. I told him that the whole property of the guardian, Micou, and his sureties, Tom and Nich. Barnett, would not pay the debt; that they and their families would be left penniless; that it would be a hard course to pursue for him and his wife and Lucy to take everything they had, as by law they could do, and that common justice and common decency demanded that they should, out of the abundance which they would have, make some provision for the wives and families of their father and uncles. Boykin very readily agreed to this; but when it came to putting it in writing he seemed to place an exaggerated estimate on the value of the property, and place many difficulties in the way. I told him that it was apparent that the ruin of the Barnetts as copartners in Barnett, Micou & Co. had been caused by the faith, trust and reliance they had placed in Micou, his wife's father; that neither he or his wife or her sister could ever enjoy the respect or confidence of the community if they did not make some proper provision for the families of Thomas M. and Nicholas Barnett, and as to their father's family, of course, I knew that nature itself would dictate a provision

for them. I suggested to him that the whole property which we could reach by execution in fact came directly or indirectly from old Mr. Barnett, the grandfather of his wife and her sister, and how highly he had been esteemed for his sense of justice and honesty; that in my honest judgment he and his wife and her sister ought to consider what Mr. Barnett would do if he were alive and the owner of the property, and to do it. The young ladies were entirely willing to do whatever I recommended, and Mr. Boykin at last consented to make the provision I incorporated in the assignment, which is copied into my answer. The assignment was made to me, as I refused to manage the matter in any other way. Miss Lucy was a minor, but I expected her disabilities of minority to be removed, and she engaged to ratify it when she became of age, which she afterwards did. Mr. Micou, so far as I know or believe, had no part in it and was not informed of it. He was not in town from the time I suggested it till it was executed. I never consulted him directly or indirectly about it, and have no reason to believe he was consulted by any one else on the subject. I never spoke to the Barnetts on the subject or any one else, or suggested the arrangement, or any arrangement, for the assignment of the decrees, or for any provision to be made for the families of the Barnetts or of Micou, until after the decrees were rendered. In saying this I mean to state that I never even spoke to Boykin on the subject of any provision for the families of his wife's father or uncles until after the rendition of the decrees."

These motives were as honorable to him who urged them as to them who accepted and acted upon them; but, independent of their character, the important fact is that the arrangement was subsequent to the time when Mrs. Boykin and her sister had become absolutely entitled to subject all the property in question to the payment of their decrees, and entirely independent of the proceedings by which they obtained them; so that it clearly and satisfactorily appears that the decrees were not in fact rendered by consent and upon the agreement that such a benefit to the families of the debtors should result. This being so, the daughters of Benjamin H. Micou had a right to dispose of their own, free from question, so long as they infringed not the rights of others; and if they chose, in their turn, to pay a debt of gratitude to the brothers of their mother, and to ease the decline of an impoverished father, we know of no provision in the code of Alabama which forbids it.

The court below proceeded upon a different view of the evidence, and rendered a decree granting the prayer of the bill. Its operation is to annul the settlements and decrees of the probate court of Tallapoosa county in favor of Mrs. Boykin and her sister, and all proceedings under them, and give priority to the complainant's judgment, without provision for securing them in the amounts admitted to be due them. It has been forcibly urged upon us in argument that, even upon the facts as charged in the bill, the decree would be erroneous in this respect, on the ground that the disability of coverture as to Mrs. Boykin, and of infancy as to Lucy Micou, and the circumstances of the fiduciary character of their relation to their father, rendered them, in law, incapable of active and responsible participation in an express fraud, so far at least as to exempt them from all liability, except to restore the actual fruits realized by them from it.

But we have not found it necessary to consider or decide that question, and it is mentioned merely to exclude all inferences that might otherwise arise.

In our opinion the evidence required that the decree below should have been in favor of the defendants, and for that error it must be reversed, and the cause remanded with instructions to dismiss the bill; and it is so ordered.

VAN NESS v. BANK OF UNITED STATES.

(18 Peters, 17-22. 1839.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—This case comes before the court upon a writ of error, directed to the judges of the circuit court for the District of Columbia, sitting for the county of Washington. It is an action of ejectment brought by the Bank of the United States, to recover sundry lots of ground in the city of Washington. The declaration contains four demises, purporting to have been made for the same premises by different lessors. The jury found for the plaintiff upon one of the demises, but said nothing of the other three; and the judgment of the court is entered, in like manner, upon the particular demise on which the jury found for the plaintiff; and without taking any notice of the others.

At the trial in the circuit court, it was admitted that David Burnes was seized in fee of the premises in controversy in his life-time, and that he died seized thereof, intestate, leaving Marcia Burnes his only child and heiress at law. The plaintiff in the court below then offered in evidence the exemplification of a record from the court of chancery of Maryland, duly certified, by which it appeared that a certain Isaac Pollock, on the 17th of May, 1800, filed his bill in the said court, against Marcia Burnes, then an infant, in order to obtain the conveyance of a large number of lots in the city of Washington, among which are the lots now in controversy; and claiming the same under a contract made with David Burnes in his life-time, which had not been carried into execution by proper conveyances at the time of his death. It further appeared, by the said record from the court of chancery, that after various proceedings in the case, the chancellor, on the 1st of November, 1800, decreed that, upon the complainant's securing the purchase money to the satisfaction of the chancellor, the infant defendant, Marcia Burnes, should, by William Mayne Duncanson, who had been appointed her *guardian ad litem*, convey the said lots to Pollock in fee. Afterwards, further proceedings having been had, the court, on the 26th of October, 1801, passed another decree, approving the security which Pollock offered (which was security on other real property), and directing that, upon the complainant's executing mortgages for the said real property to the said Marcia to secure the payment of the purchase money, she should make the conveyance by her guardian, as directed by the former decree. It is unnecessary to state more in detail the proceedings in the Maryland court, because it is admitted that they were fully warranted by the laws of that state. The plaintiff in the circuit court offered also in evidence, together with this record, the deeds of mortgage executed by the said Pollock, pursuant to the aforesaid decree; and also a deed of conveyance for the said lots from Marcia Burnes to Pollock, executed by William Mayne Duncanson as her guardian. This deed is dated January 12, 1802, after congress had assumed the government of this District. The defendant in the circuit court objected to the admissibility and competency of all the evidence above stated; but the objection was overruled by the court, and this forms the first exception.

In the further progress of the trial in the circuit court, various other deeds were offered in evidence on the part of the plaintiff, in order to show a title derived from Isaac Pollock; and among the deeds thus offered was one from Walter Smith to Benjamin Stoddart, dated March 5, 1807, acknowledged before Richard Parrott and Thomas Corcoran. This acknowledgment was dated, "District of Columbia, Washington county, to wit;" but it was not stated in the acknowledgment, nor did it appear by that instrument, that Parrott and Corcoran were justices of the peace for Washington county. In point of fact, however, they were such justices, and it is so admitted in the exception. The defendant objected to the admissibility of this deed; and this forms the substance of the second exception; for although other papers are mentioned as objected to at the time, the only point raised here is upon the acknowledgment of this deed.

§ 778. *Jurisdiction of Maryland courts in proceedings pending when the District of Columbia was formed.*

Upon the first exception the plaintiffs in error insist that the deed of conveyance from Marcia Burnes to Pollock, of the 12th of January, 1802, executed by her guardian as above mentioned, pursuant to the decree of the Maryland court of chancery, conveyed no title; that the sovereignty of Maryland over Washington county, in this District, having terminated on the 27th of February, 1801, when congress assumed the jurisdiction, the decree of the state court could not be executed, without filing an exemplification of the record, according to the thirteenth section of the act of congress (2 Stats. at Large, 107), which provided for the government of the territory, and obtaining an order for the execution of the decree from the chancery court of this District.

This objection cannot be sustained. The act of assembly of Maryland of 1791, c. 45, which ceded the territory to the United States, provided: "That the jurisdiction of the laws of the state over the persons and property of individuals residing within the limits of the cession should not cease or determine until congress should by law provide for the government thereof under their jurisdiction." The United States accepted the cession made by this law of the state; and the conditions above mentioned, therefore, formed a part of the contract between the parties; and consequently the laws of Maryland, and the jurisdiction of its courts, continued in full force, until congress took upon itself the government of the District; and as it was uncertain at what time the United States would assume the jurisdiction, it must have been foreseen that, whenever that event should happen, many suits would be found pending and undetermined in the state courts. It was certainly not the intention of the parties to the cession that such suits should abate, and that individuals who had rightfully instituted proceedings in the tribunals of the state, and incurred the expense and delays which are unavoidable in such cases, should immediately, upon the assumption of jurisdiction by the United States, be compelled to abandon the state courts, and to begin anew in the courts of the District. There could be no reason of policy or justice for adopting such a measure; and without stopping to inquire what, upon general principles of law, would be the effect of a cession of territory, upon suits then pending in the courts of the ceding sovereignty, it is evident that in this case the state and the United States both intended that the suits then pending in the Maryland tribunals should be proceeded in until the rights of the parties should be finally decided; and that the judgments and decrees there made should be as valid and conclusive as if the sovereignty had not been transferred. We have already stated

the provisions of the act of assembly of Maryland; and congress in assuming the jurisdiction recognized the rights of the state courts, and by the thirteenth section of the act of February 27, 1801, placed judgments and decrees thereafter to be obtained in the state courts, in suits then pending, upon the same footing with judgments and decrees rendered before. In either case, upon filing an exemplification of the proceedings had in the state courts, it authorized process of execution from the district court of the United States, in the same manner as if the judgment or decree had been there rendered. It makes no exception in regard to real property situated in the District; and the rights to such property then in litigation are placed on the same ground with rights to personal property and personal rights, and, like them, are left to the final adjudication of the courts of the states. And although upon a strict and technical construction of the thirteenth section of the act of congress before referred to, it may be doubted whether this decree falls within that description of judgments and decrees for which provision is there made, yet when the conditions upon which the cession was made by Maryland, and accepted by congress, are considered, it is very clear that if the guardian appointed by the state court had died or had refused to make the conveyance as ordered, the court of this District would, upon the application of Pollock, have been bound to appoint another person to execute the deed, and would not have been authorized to open again and re-examine the questions which had been decided in the Maryland court. And in such a case, the conveyance to Pollock, by the infant heiress of Burnes, would have owed its validity altogether to the decree of the state tribunal; and the title of the guarantee would have received no additional strength from the order of the district court. We can, therefore, see no necessity for an order from that court, when the guardian appointed was willing to execute it, and did execute it, in obedience to the decree of the Maryland court.

§ 779. *A deed signed "W., guardian of M.," is good in execution of a decree to convey.*

An objection has also been taken to the manner in which this deed is signed and acknowledged. It is signed "W. M. Duncanson, guardian for Marcia Burnes;" and he acknowledges it "to be his act and deed, as guardian as aforesaid, and thereby the act and deed of the said Marcia."

It is argued that it should have been signed "Marcia Burnes, by her guardian W. M. Duncanson," and in like manner acknowledged "as her act and deed." This is a case where no question arises as to the manner of executing an authority given by private persons, as to which the case of *The Lessee of Clarke v. Courtney*, 5 Pet., 319, 349, 350, may justly apply. But is the case where an authority is to be exercised under the decree of a court of chancery, and therefore where a liberal construction may and ought to prevail. These two forms of signature and acknowledgment mean precisely the same thing; and as this deed substantially conforms in the manner of its execution to the directions contained in the decree, we consider it to be valid and effectual to convey the property therein mentioned.

Upon the second exception, the plaintiff in error contends that the acknowledgment of the deed from Walter Smith to Benjamin Stoddart is defective, and the deed inoperative, because it does not appear in the certificate of acknowledgment indorsed upon the deed that the persons before whom it was made were at that time justices of the peace for Washington county; and he insists that this omission cannot be supplied by parol.

§ 780. *Where the statute of conveyances does not require an officer to state his official character in the certificate of acknowledgment, it is not necessary. It may be proved by parol.*

This question depends upon the construction of the acts of assembly of Maryland which prescribe the mode in which deeds shall be acknowledged for the conveyance of real property; those acts of assembly having been adopted by congress in the act assuming jurisdiction, together with the other laws of Maryland then in force. We perceive nothing in the Maryland acts of assembly which requires justices of the peace or other officers to describe in their certificates their official characters. It is no doubt usual and proper to do so, because the statement in the certificate is *prima facie* evidence of the fact, where the instrument has been received and recorded by the proper authority. But such a statement is not made necessary by the Maryland statutes. And whenever it is established by proof that the acknowledgment was made before persons authorized to take it, it must be presumed to have been taken by them in their official capacity; and when their official characters are sufficiently shown by parol evidence, or by the admissions of the parties, we see no reason for requiring more where the acts of the legislature have not prescribed it. On the contrary, the soundest principles of justice and policy would seem to demand that every reasonable intendment should be made to support the titles of the *bona fide* purchasers of real property; and this court is not disposed to impair their safety by insisting upon matters of form, unless they were evidently required by the legislative authority.

§ 781. *Supreme court bound by the construction of state statutes given by courts of last resort of such states.*

If the Maryland courts had given a contrary construction to these acts of assembly, we should of course feel it to be our duty to follow their decision. But we do not find the point decided in any of the Maryland reports. In the case of *Connelly v. Bowie*, 6 Har. & J., 141, the certificate of acknowledgment did not state that the persons by whom it was taken were justices of the peace, and there was no evidence in the record to prove their official character. The deed was therefore clearly inadmissible, and it was so ruled by the court of appeals. But it does not follow that the decision would have been the same if parol evidence had been given to prove their official character; and from the language of the court in that case, it may rather be inferred that, if other evidence had been offered, it would have been deemed admissible to supply the omission in the certificate indorsed on the deed.

§ 782. *Errors of form cured by verdict and judgment under act of congress of 1789.*

The objection made to the verdict and judgment applies altogether to the form of the proceeding, and does not in any degree affect the merits of the controversy. The verdict and the judgment, it appears, are upon one of the demises only; and it is insisted that, as the jury did not find all of the issues committed to them by the pleadings, the circuit court ought not to have entered a judgment for the plaintiff upon the issue found in his favor, but should have awarded a *venire de novo*; and that this irregularity in the proceedings may be taken advantage of upon a writ of error. It is not necessary to examine whether this objection could be maintained upon the practice and decisions of the English courts in relation to the action of ejectment. For the act of congress of 1789, c. 20, § 32, expressly provides, among other things, that no judgment shall be reversed for any defect or want of form, but that the

courts shall proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regarding any imperfections, defects or want of form in the judgment or course of proceeding, except those specially demurred to. Now the demises laid in a declaration in ejectment are known to be fictitious and mere form; and if the appellant had taken this objection in the circuit court, in arrest of judgment, the plaintiff would undoubtedly have been permitted to strike these demises from the declaration, and thus obviate the objection. The omission of the plaintiff to do this was nothing more than an omission of a matter of form; and if, therefore, this proceeding in the circuit court should be held to be irregular, it is nothing more than an error of form, and, as such, furnishes no ground for the reversal of the judgment.

The judgment of the circuit court is therefore affirmed, with costs. (a)

WARD v. NEW ENGLAND SCREW COMPANY.

(Circuit Court for Rhode Island: 1 Clifford, 565-579. 1890.)

STATEMENT OF FACTS.—A guardian obtained a special act of the legislature to sell lands of the ward's for a pest-house, and deed was so made. The wards sued for the land, on the ground that it was not used as intended.

§ 783. *Language of the act considered. Legislatures may license a sale of infant's land by special act. Whether the use specified was mere inducement or not.*

Opinion by CLIFFORD, J.

To solve the matter in dispute, it becomes necessary to attend with some care to the language both of the act of assembly and of the deed. Both parties concede that Martha Field was the duly constituted guardian of George and Mary Field, and it is not questioned by either that she petitioned for authority to sell a portion of the estate of her wards. By the preamble to the act of assembly, it appears that she represented in her petition that a committee appointed by the town to procure a place to erect a small-pox house for the use of the town had made choice of a remote corner of the estate of her wards, and had applied to her to sell the same to the town. She also represented that the part applied for was barren, and of little consequence; and, being desirous of accommodating the town, she prayed that she might be empowered to sell the same to the town for that purpose. After reciting these facts in the preamble, the act of assembly, among other things, provides that the said Martha Field be, and she is hereby, authorized to make sale of the said two acres and a half of land for the said purpose; and that a deed thereof, made and executed pursuant to this act, shall vest in the purchaser all the right, title and interest of the said Isaac Field in and to the same; and it also provides that the money arising therefrom be appropriated to the use of the said heirs, and that the sale be made under the direction of the town council of Providence, with the usual provision requiring the guardian to account with the said council for the appropriation of the money. On the face of the act, it is apparent that the legislative assembly intended to exercise the power of granting a license for the sale of that portion of the minors' real estate. That conclusion rests, not only upon the fact that the legislative act is based upon the petition of the administratrix of the estate and the guardian of the minors, but upon the express declaration that a deed made and executed in pursuance

of the authority granted should vest in the purchaser all the interest which descended to the minors at the decease of their father. Most of the states have general laws making provision for the sale of estates of minors by their guardians, either for their support or education, or to pay their just debts, or for the purpose of changing the investment. Such laws generally require a license from some court of record; and the license is not usually granted except on petition of the guardian, and after public notice to all interested. No one, probably, at this day would question the validity of such a general law to provide for the granting of licenses to authorize the sale of such estates, whether the authority was conferred upon a court of general jurisdiction, or a district or county court, or even upon the court of probate. Assuming that the legislature may confer such power upon the courts of a state, for the sale of a minor's real estate and for the investment of the proceeds, it is difficult to see any reason why the legislature may not exercise the power directly by special act. Clearly, the character of the act in question is remedial, and, in point of fact, it has no other characteristic; and we think it cannot be distinguished in principle from a general law upon the same subject. Authority is given to sell the land and invest the proceeds, but a sale is not ordered or directed; nor is there a word in the act to control the legal discretion vested in the guardian. She was left to fix the terms of sale without restraint, and to sell or not, as she might thereafter determine to be best for the interest of her wards. But it is insisted by the plaintiffs that the act in question is not one where the legislature attempted to exercise its tutelary power over the estates of minors or other persons incapable of disposing of the same. On the contrary, it is insisted that it was the exercise, on the part of the legislature, of the power of eminent domain. Looking at the whole act, however, there does not appear to be any foundation for the proposition; and sufficient has already been remarked, we think, to demonstrate its fallacy. Whatever is said respecting the use to which the land was to be applied by the town was mere inducement to the legislative assembly to grant the prayer of the petition; and that remark applies with equal force to every one of the phrases in the recitals of the preamble, on which the theory of the plaintiffs is based. Universal experience teaches that the tribunals intrusted with the ultimate power of granting licenses in cases of this description find it necessary, as it is their duty, to examine each particular application with scrutiny, and to exercise a careful supervision over the rights of those interested in the estate. Consequently the petitioner is required to assign solid reasons for the application, and oftentimes finds it prudent to introduce defensive allegations against the inference of interested motives. Allusion was accordingly made in this case to the promotion of the public health, to guard against any such suspicion, and to show that the petitioner did not originate the suggestion.

Another allegation in the petition is, that the land was barren, and of little consequence; and that representation was doubtless made, not only to show that the residue of the estate would not be injured by the sale, but also to show that a change of investment would be beneficial to the minors. Unconditional provision was made in the act that the money should be appropriated to the use of the heirs; and it was expressly provided that the sale should be made under the direction of the town council. At that period in the history of the state the town council, so called, exercised all the ordinary powers of a court of probate; and it was also provided, in effect, that the guardian should account to the town council for the proceeds of the sale. Without entering

more into detail, suffice it to say that we are of the opinion that, by the true construction of the act of assembly, it must be understood as conferring a license upon Martha Field, guardian of George and Mary Field, to sell such portion of the real estate of her wards as was therein described, and to invest the proceeds of the sale for their benefit, under the direction of the town council of Providence; and she was not only authorized to sell the land, but to make and execute a sufficient deed to vest in the purchaser all the right, title and interest in and to the same which descended to her wards from their father.

§ 784. *Exercise of authority under legislative act. Words descriptive of a use are not a condition.*

Having ascertained the true nature and extent of the authority conferred upon the guardian, it only remains to consider and determine in what manner that authority was exercised. As described in the deed, the parcel of land sold and conveyed contained two acres and thirty poles; and it was sold, as appears from the consideration recited in the deed, for the sum of one hundred and nine and three-eighths Spanish milled dollars. Nothing, therefore, can be inferred in favor of the theory of the plaintiffs from any supposed inadequacy of consideration, as \$50 an acre, at that period of time, for barren land, situated in a remote corner of the town of Providence, may well be assumed as its fair value. Among other things, the deed shows that the conveyance was made to the town treasurer, or his successors in office, forever, in trust for the town; and in the granting clause it purports to be a full, free and absolute conveyance of the land, without condition or limitation. But the introductory part of the instrument, preceding the granting clause, refers to the authority to sell and convey, as derived from the act of assembly, and in that connection recites the purpose the town had in view in making the purchase. Considering, however, that the same recital was inserted in the act of assembly, which, nevertheless, authorized an absolute conveyance of all the right, title and interest of the minors in the premises, we are of the opinion that the words "for the purpose of erecting a pest-house upon" are merely descriptive of the use to which it was the intention of the town, at the time of the purchase, to apply the land, and that they were not inserted as a condition in the grant, or as a limitation or qualification to the estate conveyed. They would scarcely have that effect even if taken separately, but when considered in connection with the words of the granting clause it is quite obvious, we think, that the parties never intended to give them any such signification. When considered in connection with the other parts of the instrument, it is much more reasonable to suppose that they were inserted for the benefit of the purchaser. Undoubtedly it was the intention of the town to erect a small-pox house on the land purchased; and it may well be that the recital was inserted in the deed to foreclose all future complaint against such an appropriation of the premises. Be that as it may, it must, nevertheless, be assumed that if the grantor had intended to create any such condition or limitation to the estate as is supposed by the plaintiffs, she would have employed, either in the granting clause or the *habendum* of the deed, some fit and proper language to signify such an intention. Nothing of the kind is pretended by the plaintiffs, so far as respects the granting clause, but reliance is placed upon the concluding phrase of the *habendum*, as tending to support that theory. As given in the instrument, the *habendum* reads as follows: "To have and to hold the said granted and bargained premises, with all the privileges and ap-

purtenances thereto belonging or in any wise appertaining, . . . for the use aforesaid, forever."

§ 785. *Conditions precedent or subsequent are not distinguished by technical words; definitions of precedent and subsequent.*

Conditions in a conveyance are either precedent or subsequent; and as there are no technical words to distinguish them, it follows that whether they be the one or the other is a matter of construction, and depends upon the intention of the party creating the estate. *Hotham v. The East India Co.*, 1 Term, R., 645; *Finlay v. King*, 3 Pet., 374. Precedent conditions are such as must take place before the estate can vest, and must be literally performed. Subsequent conditions are those which operate upon estates already created and vested, and render them liable to be defeated or forfeited. 4 Kent's Com. (9th ed.), 125. Most of the estates upon condition in law are of the latter kind, and are liable to be defeated upon breach of the condition, as on failure to pay rent, or the non-performance of other services annexed to the estate. Where a devise of lands was made to a town for a school-house, provided it should be built within a hundred rods of a given place, the proviso was held to be valid, as a condition subsequent, and that the estate was forfeited by a neglect to fulfill the condition for a period of twenty years. *Hayden v. Stoughton*, 5 Pick., 539. Unquestionably a breach of the condition authorizes the heir to enter; and if he make good his claim, he may hold the land, although it was vested for a time in the grantee or devisee. *Shep. Touch.*, 450; 2 Bl. Com., by Shars., 155. Conditions subsequent, says Chancellor Kent, are not favored in law, and are to be construed strictly, because they tend to destroy estates; but whether so or not, it is clear that they are not to be implied, unless it appear from the language employed in the instrument that such was the intention of the parties. *Merrifield v. Cobleigh*, 4 Cush., 178; *Catlin v. Springfield F. Ins. Co.*, 1 Sumn., 440; *Doe v. Banks*, 4 B. & A., 401; *Co. Litt.*, 205*b*; 4 Kent's Com. (9th ed.), 146. Certain words and phrases, it is said, make an estate conditional, of themselves, without expressly giving the power of entry; and examples to that effect are given in several standard treatises upon the subject of conditional estates. *Co. Litt.*, 203 *a* and *b*; *Litt. Ten.* by Toml., 374; 2 Greenl. Cruise, 3; 2 Bac. Abt. by Bouv., tit. Condition, *a*, *h*, 280, 287. None of the words, however, put by the elementary writers as examples of what will create a condition in a deed of conveyance are to be found in the deed in this case, nor any other which, properly understood, falls within the same category.

§ 786. *Deeds to be construed liberally.*

Deeds, as well as other written instruments, ought in general to receive a liberal construction so as to uphold them, if possible, and carry into effect the intention of the parties. Effect ought to be given, if reasonably practicable, to every part of the instrument; and in order to accomplish that object, it is indispensably necessary to compare one part with another, and apply the whole to the subject-matter described in the instrument.

Applying these rules to the present case, it is quite obvious that the words of the *habendum*, "for the use aforesaid, forever," cannot possibly be construed as a condition in the grant, or as a limitation to the estate. Those words must be taken in connection with the words of the granting clause, which clearly show that it was the intention both of the grantor and grantee to convey an absolute unconditional estate; and they must also be weighed and interpreted in connection with what follows in the same instrument. Contrary to what is usual in conveyances of this description, the grantor not only covenants that

she has good right and lawful authority to sell and convey the described parcel of land, but also covenants that the grantee shall quietly and peaceably enjoy the premises in manner aforesaid, and that she will forever warrant and defend the same against the lawful claims and demands of all persons. Comparing one part of the instrument with another, and the whole with the act of assembly authorizing the sale, not a doubt is entertained by the court that it was the intention of the grantor to convey to the town of Providence all the right, title and interest which her wards acquired in the premises by descent at the decease of their father. Two theories are suggested as to the precise signification of the particular words under consideration, either of which appear to be more reasonable and more in consonance with the general tenor and scope of the instrument, and consequently to be preferred to that suggested by the plaintiffs. One is that they must be regarded as a substitute for the words "in trust for said town," which are contained in the granting clause of the instrument, and that they were inserted to exclude the conclusion that the conveyance was made for the individual benefit of the grantee named in the deed. Another is that they were employed merely as descriptive of the purpose which the town had in view in making the purchase; but whether the one or the other it is nevertheless obvious that they were not employed as creating a condition in the conveyance or as a limitation to the estate. Such a construction would be a forced one, even if the words were separately considered; but when the phrase is compared with the other parts of the instrument and the act of assembly authorizing the sale, it is clear that it cannot be sustained. Neither the act of assembly nor the deed afford any evidence that the town had agreed with the grantor to make the contemplated erection on the premises, or that she thought it of consequence to stipulate that the land should be appropriated to that use; and in the absence of any such stipulation or agreement, it can hardly be inferred that the adjacent proprietors are damaged by its discontinuance. For these reasons we are of the opinion that the demurrer of the defendants to the plaintiffs' special replication must be sustained, and judgment must be entered accordingly.

GAGER v. HENRY.

(Circuit Court for Oregon: 5 Sawyer, 237-240. 1878.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—This action is brought to recover the possession of the undivided half of fifty-one and eighty-two one-hundredths acres of land situate in the northwestern corner of the donation of Joel Perkins and Laura Ann, his wife, in Yamhill county. It was tried by the court without the intervention of a jury. There is no conflict in the evidence, and the material facts are as follows: That in 1847 Joel Perkins occupied the premises, and prior to 1851 became a married man and a settler thereon under section 4 of the donation act of September 27, 1850 (9 Stat., 497), and prior to 1855 complied with the provisions of said act so as to entitle himself and wife to the grant thereof, and died in 1856 intestate and before the patent issued, leaving a widow, now living, and three children, two of whom, Harriet Jane and Joan Minnette, died in infancy and prior to April 14, 1877, and the commencement of this action; that Dan Hawn Perkins, the remaining one of said children, was born in 1854, and on April 14, 1877, did convey all his interest in the premises to the plaintiff.

This is the plaintiff's case; and upon this state of facts he is, as the successor in interest of said Dan Hawn, the owner of the undivided one-half of the premises and entitled to the possession thereof. The settlement being made under section 4 of the donation act, and the settler having died intestate before the patent issued, the case falls within that provision of said section 4 which provides: "In all cases where such married persons have complied with the provisions of this act so as to entitle them to the grant as above provided, . . . and either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions." 9 Stat., 497. Under this act upon the death of Perkins his share of the donation was granted over to his widow and three children in equal parts, and upon the death of Harriet Jane and Joan Minnette, without issue, their interests, under sub. 3 of section 1 of the "Act to regulate the descent of real property," etc. (Or. Laws, 547), descended to the surviving child, Dan Hawn, and the mother in equal parts, whereby they two became the equal owners of the premises.

But from the evidence introduced by the defendant it appears that, on September 7, 1865, one Hank W. Allen was, by the county court of Yamhill county, duly appointed guardian of the three minor children aforesaid, and then and there duly qualified as such; that, on December 4, 1865, said guardian filed a petition, duly verified, in said county court, setting forth therein that his wards' estate consisted wholly of real property worth about \$8,000, and that it was incumbered with a debt of \$800, which the income of the property was insufficient to pay after supporting said wards, and praying for a license to sell enough of said real property to pay said indebtedness; that upon the filing of said petition said county court made an order fixing the hearing of the same on January 5, 1866, and directing notice thereof to be given to the next of kin and others interested, and that said notice be published in the Oregon Statesman for four successive weeks; that said notice was duly published in said paper "for three consecutive weeks, to wit, from the week commencing December 18, 1865, to the week ending January 1, 1866;" that, on January 5, 1866, said county court made an order licensing said guardian to sell in the manner provided by law certain portions of the real estate of said wards, not exceeding \$1,000 in value, to pay the debts aforesaid, including a portion in the northwest corner of said donation, not to exceed one hundred and forty acres, which portion includes the premises in controversy, and which order recites that the notice aforesaid to the next of kin and others interested had been duly published in the Oregon Statesman "for three successive weeks, ending January 1, 1866," and that no one objected or appeared to show cause why said license should not be granted; that said guardian published due notice that said property would be sold "at public auction" on February 6, 1866, between the hours of 9 A. M. and 4 P. M., at the court-house door, in Lafayette, in the Oregon Statesman aforesaid, a paper of general circulation in Yamhill county, for four consecutive weeks, to wit, from the week commencing January 8, 1866, to the week ending February 5, 1866, and, before fixing the time and place of such sale, gave the bond and took the oath required by law from guardians licensed to sell the real property of their wards; that afterwards, on April 4, 1866, said guardian reported to said county court that on February 4, 1866, after giving legal notice of such sale by posting written notices thereof in four public places in Yamhill county, Oregon, four weeks prior thereto, and by publishing a similar notice in the Oregon Statesman of the time and

place of sale as aforesaid, he offered the premises for sale at the court-house aforesaid, and, there being no bids therefor, did by proclamation then and there publicly postpone said sale until March 6, 1866, between the hours aforesaid, and that on the day last aforesaid, at the court-house aforesaid, he again offered the interests of his wards in the premises, the same being the undivided three-fourths thereof, for sale at public auction, and then and there sold the same to the defendant for \$4.75 per acre, that being the highest and best bid therefor, and prayed that said sale be confirmed, whereupon said court made an order continuing said matter until its next regular term; that afterwards, on May 10, 1866, said county court, on consideration of said report, found that said guardian had given due and legal notice of the time and place of the sale of said premises "by publication and written posted notices as required by law," and sold them at public auction accordingly, at the court-house aforesaid in the county aforesaid, to the defendant, he being the highest and best bidder, for the sum of \$4.75 per acre, that being the fair value of the same, and thereupon ordered that said sale be confirmed, and that said guardian, upon the payment of the sum bid in gold coin, convey to the defendant all the interest of his said wards in the premises, by metes and bounds, as therein described, which was duly done upon the day last aforesaid.

Upon these facts the defendant claims to have acquired the interests of the children of Joel Perkins, deceased, before the death of Harriet Jane and Joan Minnette, aforesaid, in the premises, and to be the owner of the same. On the contrary, the plaintiff insists that the proceedings in the guardian's sale are invalid, and therefore nothing passed by his deed to the defendant.

The objections made to the proceedings are: 1. The order setting the petition down for hearing does not find that the sale was "necessary;" 2. Said order does not require any one to appear and "show cause why a license should not be granted;" 3. Neither the petition, the said order, nor the citation contain any description of the premises; 4. There was no sufficient service of the citation by publication; and, 5. There was no notice given of the time and place of sale.

§ 787. *In Oregon the county court, when acting as a probate court, is a court of general jurisdiction.*

In considering these objections it must be borne in mind that according to section 1 of article 7 of the Oregon constitution, as construed by the supreme court of the state, in *Tustin v. Gaunt*, 3 Or., 306, the county court of Yamhill county, when exercising this jurisdiction over the lands of these minors, was a court of general jurisdiction, and therefore its proceedings and judgments are to be considered in the light of the rule that prevails in such cases — the jurisdiction is presumed until the contrary appears; and that where the record is silent, that which ought to have been done is presumed to have been done, and rightly done. *Neff v. Pennoyer*, 3 Saw., 297; *Gray v. Larrimore*, 4 Saw., 638; *Grignon's Lessee v. Astor*, 2 How., 341 (Covers, §§ 496-500).

§ 788. *The judgment of a court of general jurisdiction need not state the facts on which it is founded.*

The first of these objections is based upon the fact that the statute (Or. Laws, p. 739, sec. 7) provides in effect that if it shall appear to the court, from the petition of the guardian for license to sell the real estate of the ward, "that it is necessary, or would be beneficial to the ward," that the property or some part of it should be sold, it shall make the order for the next of kin, or those interested in the estate, to appear and show cause why the prayer of the

petition should not be granted, and upon the assumption that the court must not only have found that the sale was necessary, but that such finding must be stated in the order. Now, it is an elementary rule that the judgment of a court of general jurisdiction need not state the facts or conclusions of fact upon which it is founded or authorized. *Grignon's Lessee v. Astor, supra*. This it is which primarily distinguishes it from the judgment of a court of inferior jurisdiction. That which is necessary to the judgment of such a court is presumed to have been shown to it, and found or determined by it. Or. Civ. Code, sec. 726.

§ 789. *The sale of a ward's land in Oregon need not be shown necessary; it is sufficient that it is beneficial.*

But it is to be observed that the statute does not absolutely require that it should appear to the court that the sale was necessary; it is sufficient if it appears that it would be beneficial. No question is made but what the petition is sufficient. It states the character and value of the wards' estate, and the amount of the indebtedness thereon, and that the income thereof is not sufficient to pay such indebtedness and maintain the wards. This makes a case of apparent necessity, and the court in making the order found, and stated therein, that it was "proper and reasonable" that the petition should be heard. Of course, it was not proper that the petition should be heard unless it appeared therefrom either that it was "necessary" or "beneficial" to the wards, that the prayer thereof should be granted.

§ 790. *Provisions in Oregon as to notice of application to sell ward's land considered.*

It is also objected that the order is insufficient, because it does not require any one to appear and show cause why the license should not be granted. It is true that the order does not contain such a direction in so many words, but it does require that notice be given to the next of kin, and all others interested, to appear at a proper time and place, when and where said petition will be heard and determined. This, we think, is the substantial equivalent of the language of the statute (section 7, *supra*), "to show cause why a license should not be granted," etc. The only purpose of the statute is to provide for giving notice of the time and place of the hearing of the petition to those most likely to be interested in the welfare of the minors, so that, if need be, the petition may be contested by them. But the court cannot compel any one to show cause against the petition, or say aught against its allowance. When it has directed notice to be given to the proper persons of the hearing of the petition, the statute is substantially complied with, although such direction and notice should not require them, in so many words, to show cause thereon. Indeed, it seems too plain for argument, that when the next of kin, and others interested, are duly notified to appear at the hearing upon a petition by a guardian to sell a minor's land, that such persons are thereby in effect required, notified, to appear and show cause, if need be, why the petition should not be granted.

§ 791. *The law in Oregon does not require that there should be a specific description of land in an application for its sale by a guardian.*

The order is sufficient. As to the third objection: The statute (Or. Laws, p. 789, sec. 6) provides that the petition for a sale by guardian shall set "forth the condition of the estate of his ward, and the facts and circumstances under which it is founded, tending to show the necessity or expediency of such a sale." Section 1 of the statute (Or. Laws, p. 738) authorizes the sale of the

ward's "real estate," whenever his income is insufficient to maintain him. Section 6, *supra*, authorizes the guardian to file a petition to obtain a license for such sale; that is, the real estate of the ward, the whole of it if need be. Doubtless the petition may ask for the sale of a specific portion of the estate, and in such case the order of sale should not go beyond such portion. But there is nothing in the statute or the nature of the case that requires the guardian to petition for the sale of any specific portion of the real property. Except by a sale ordinarily it cannot be known what quantity of the estate must be disposed of to meet the particular exigency. Upon the hearing of the petition the court will ascertain whether it is necessary or expedient to sell the whole of the property, or only a portion of it, and order accordingly.

§ 792. *In Oregon a petition for license to sell a ward's land is not an action inter partes, but in the nature of a proceeding in rem.*

The fourth objection is based upon the fact that the order for a hearing upon the petition directs the notice to the next of kin and others to be published "for four successive weeks," while the proof of publication only shows that it was published three weeks. This, at least, is a serious irregularity; and if the jurisdiction of the court did not attach upon the filing of the petition, but until due service of the prescribed notice of the time and place of the hearing on the petition, the subsequent proceeding would be probably void. The county court being one of general jurisdiction, its authority to license and confirm this sale will be presumed unless the contrary appears. But in this case the contrary does appear, for it is shown by the record that the notice was not duly served, and therefore, so far as it depends upon this fact, it affirmatively appears that the court did not acquire jurisdiction. But the better opinion seems to be that the proceeding by a guardian to obtain a license to sell his ward's land is not one between adverse parties, and of which the court does not acquire jurisdiction until due service is made of the notice of the application, but rather a proceeding in the nature of one *in rem* carried on by and in the interest of the ward through his legal representative, the guardian. *Mason v. Wait*, 4 Scam., 133; *Fitzgibbon v. Lake*, 29 Ill., 177; *Fitch v. Miller*, 20 Cal., 381.

In *Fitzgibbon v. Lake*, *supra*, the court, in considering the question of what gives jurisdiction in such a case, cites with approval the following from *Young v. Loram*, 11 Ill., 637: "They all agree that enough must appear in the application or the order, or at least somewhere on the face of the proceedings, to call upon the court to proceed to act; and all agree that when that does appear, then the court has properly acquired jurisdiction; or, in other words, is properly set to work."

§ 793. *A proper petition by a guardian gives the court jurisdiction; its judgment for selling ward's land cannot be questioned collaterally.*

Now, upon the filing of the petition by Allen — it being a sufficient one — the county court was called upon to proceed to act, to make an order prescribing what and how notice should be given to the next of kin and others. In *Fitch v. Miller*, *supra*, the court say: "In order to render the sale [a guardian's] effectual to confer a valid title the probate court must have acquired jurisdiction of the case by the presentation of a proper petition by the guardian."

It follows, that when the county court of Yamhill county made the order directing the publication of the notice to the next of kin and others, and afterwards heard the petition upon a publication of such notice for a shorter

time, it had acquired jurisdiction by the presentation of a proper petition — and this fact itself would be presumed in the absence of anything to the contrary — and therefore its judgment cannot be questioned collaterally on account of any errors it may have committed in the course of its subsequent proceedings. And for the same reason, the first three objections already otherwise disposed of cannot be made in this manner.

§ 794. *Conditions necessary to validate a guardian's sale.*

Besides, so far as this action is concerned, all the errors or irregularities so far considered are cured by the statute (Or. Laws, p. 740, sec. 20), which provides that when the ward or any person claiming under him shall contest the validity of a guardian's sale "the same shall not be avoided on account of any irregularity in the proceedings; provided it shall appear: 1. That the guardian was licensed to make the sale by a county court of competent jurisdiction; 2. That he gave a bond that was approved by the county judge; 3. That he took the oath prescribed by statute; 4. That he gave notice of the time and place of sale as prescribed by law; and, 5. That the premises were sold accordingly at public auction, and are held by one who purchased them in good faith."

This statute was enacted in the territorial times (December 16, 1863), with reference to such proceedings in the probate courts, and appears to assume, as I suppose the fact was, that they were not courts of general jurisdiction, but that the evidence of their jurisdiction and its lawful exercise must appear on the face of their proceedings, and therefore provides that their jurisdiction shall not be questioned collaterally except for some of the errors specified in the aforesaid five particulars. But the constitution of the state having conferred the probate jurisdiction on the county courts and declared them courts of general jurisdiction, their judgments in this respect, without this statute, could not be inquired into collaterally upon any of these grounds except the first — was the court that granted the license for the sale competent to do so? — in other words, had it jurisdiction of the subject? The effect of the statute was to limit the grounds upon which such proceedings in the probate courts could be attacked collaterally while its application to them in the county courts operates to enlarge the scope of such attack. Assuming what was taken for granted upon the argument, that the statute is applicable to the proceedings for the sale of a minor's land in the county court, the result is that the jurisdiction and lawfulness of the proceeding is not unqualifiedly presumed, but it must appear therefrom not only that the license was granted by a court of competent jurisdiction, but that in the exercise of that jurisdiction the matters and things specified in the last four of the particulars aforesaid were had or done. But as to any errors or irregularities in other respects the statute operates as an absolute confirmation of the sale when it declares in effect that the sale shall not be avoided on account of them. Therefore the first four of the plaintiff's objections to the validity of the sale, even if otherwise sufficient, are obviated by the statute. Neither of them come within the category of objections which the statute permits to be made in this action to the validity of the sale. It only remains to consider the fifth and last objection — that there was no notice of the time and place of sale.

§ 795. *Facts of which courts take judicial notice.*

This objection as to *place* is based upon the statute (Or. Civ. Code, sec. 289), which provides that all sales of real property shall take place at the courthouse door, and the fact that the notice only states that, by virtue of a license

from the Yamhill county court, the guardian will sell the premises at the court-house door in Lafayette, without expressly stating in what county. Being established by law, it is a matter of judicial cognizance that there is a county of Yamhill in Oregon, and that the place where its court-house is situated and its courts held is Lafayette. *Prima facie*, then, a sale made at the court-house door in Lafayette, in Oregon, was made in Yamhill county, Oregon, because there is no other Lafayette in Oregon which contains a court-house or is a county seat. We think the notice of the place of sale sufficient. The report of the sale, showing that the sale was made "accordingly," is still more explicit. It states that the premises were sold at the court-house door in Lafayette in said county, meaning Yamhill.

§ 796. *What irregularities in a sale are cured by its confirmation.*

This objection, as to *time*, is based upon the fact that the sale was adjourned from February 6 to March 6, 1866, for want of bidders, instead of one week, as directed by statute. Or. Laws, p. 739, sec. 12; p. 329, sec. 1110; p. 168, sec. 290. The statute provides that the guardian shall conduct the sale as upon an execution. In making a sale upon execution, the officer intrusted with the process may postpone the sale for want of purchasers or other sufficient cause, "not exceeding one week, . . . and so on for like cause, giving notice of every adjournment by public proclamation made at the same time." P. 168, sec. 290, *supra*.

In considering this objection it may be well to premise that but for the statute (sec. 20, subs. 4 and 5, *supra*) the irregularity upon which it was predicated would be cured by the confirmation of the sale, and it could not now be used to avoid it. This was a sale upon a decree of a court acting as a court of probate, and proceeding substantially as a court of equity — what is called a "judicial sale," as distinguished from one made by a ministerial officer upon process to enforce the judgment of a court of law. In such a sale the matter is under the direction of the court, and the proceedings are reported to it for its approval. The purchaser is simply a preferred bidder, and the court may accept or refuse his bid, as the sale is really made by the court — it is a part of the judicial proceedings in the case — and the decree of confirmation, when the court has acquired jurisdiction, is conclusive of the regularity of the intermediate proceedings. *Williamson v. Berry*, 8 How., 546; *Freeman on Executions*, sec. 311; *Blossom v. Railroad Co.*, 3 Wall., 207. This being the case, this statute limiting the general rule as to the effect of a confirmation of such a sale ought not to be construed with a view of enlarging its operation, but the contrary. Passed originally with a view of sustaining the proceeding for the sale of a minor's land in a court of inferior jurisdiction, in the mutations of government and tribunals it has come to be applied to the same proceeding in a court of general jurisdiction, so as to materially modify the presumption in favor of its validity. The question, then, upon which this case must now turn is, was the guardian's sale made upon a notice of the time thereof as prescribed by law? It is admitted that due notice of the time of sale was given originally, but it is denied that the sale was made "accordingly." It is admitted that the guardian had the power to adjourn the sale from week to week for more than four weeks, but it is denied that he could do so at any one time for more than one week. But if a sale made at an adjourned day is nevertheless made upon or in pursuance of the original notice thereof, then this sale was made according thereto — that is, conformably to, and not contrary to, such notice. If so, the irregularity of continuing the sale for four

weeks by one adjournment rather than by four does not vitiate the proceeding. We think this sale was made conformably to the original notice. The terms and place of sale were not changed. Such notice was the foundation of the proceedings, and the adjournment by the guardian for good cause prolonged it until the day appointed.

§ 797. *Postponement of a sale authorized.*

All persons who attended at the place of sale in February were then duly apprised by the public proclamation of the guardian that the sale was postponed until March, and thereby the publicity imparted to the transaction by the original notice was continued to the time of sale. The time of the sale is primarily fixed by the notice, but may be postponed by the guardian. This power is inherent in his office, and although the statute has prescribed limits to its exercise, we do not think a single postponement for four weeks, rather than four postponements for four weeks, is such an irregularity as makes the sale not according to the notice as to time. In *Richards v. Holmes*, 18 How., 147 (Conv., §§ 1175-79), a trustee was authorized to sell real property on thirty days' notice, published in a certain newspaper. At the time and place designated the sale was adjourned for want of bidders. The court held the subsequent sale valid, because there was an implied power in the trustee to adjourn the sale, and because the sale, although made without any other than the first publication of the required notice, was, "when made, in effect the sale of which previous public notice was given."

A question was made on the trial as to the sufficiency of the description of the premises in the guardian's deed. But by reference to the survey introduced by the plaintiff, and the calls in the deed for the adjoining premises, we find no difficulty in locating the land.

We think that the defendant has the legal title to the premises, and there must be a finding accordingly.

LOBRANO v. NELLIGAN.

(9 Wallace, 295-298. 1869.)

ERROR to the Supreme Court of Louisiana.

STATEMENT OF FACTS.—The Civil Code of Louisiana makes the father the manager of the estate of his minor children, and imposes a tacit mortgage upon his immovable property as security for the trust. A special act of the Louisiana legislature empowered Robb, who thus managed his minor children's estate, to sell his real estate, investing proceeds after a certain manner in pursuance of his trust, and permitting the probate court to discharge the tacit mortgage on compliance with these terms. The probate court discharged accordingly; but in a subsequent purchase of the real estate defect in the title was alleged, and it was set up that the legislative act in question was unconstitutional.

§ 798. *It is not impairing the obligation of contracts for a legislature to sanction a change of securities in the investment of a minor ward's property.*

Opinion by MR. JUSTICE DAVIS.

It is contended that the statute authorizing Robb to sell is invalid, because it impaired the obligation of a contract; but we think this a mistaken view of the subject. It is certain there was no contract to violate, which the parties themselves had any hand in making, and the inquiry arises whether the law has made one for them which has been impaired by this statute. It will not

be questioned that the legislature possesses the power to determine by law the manner in which the estates of infants shall be preserved, and to say what kind of security shall be given by those who are intrusted with their management, and, if so, as a necessary consequence, it has the power of altering the law on the subject, whenever in its judgment the interest of the minors or the public good requires that it should be done.

In most of the states of the Union the guardian of the property of a minor gives bond, with personal securities, for his faithful conduct; but in Louisiana, in case the father occupies that relation, a different security has been provided, for his entire real estate is bound for the proper discharge of his trust. The security is called a tacit mortgage, which is nothing more than a regulation by law to assure the property of the minor in the custody of the parent against loss. The legislature thought proper to adopt this measure of protection as a general policy on the subject to which it relates, and as there is no constitutional restraint on its action in this regard, it can change or modify this policy whenever it thinks proper to do so. And it has so far modified it, that the natural tutor of his minor child can at any time remove the general lien on his real estate, by executing a mortgage on a specific part of it, which he is at liberty to change to other property. This course of proceeding, authorized as early as 1830, must have been generally adopted, and although the security for the minor is actually lessened by it, as a part is taken in pledge where the whole was previously bound, it does not appear that the constitutionality of the statute has ever been questioned. The wisdom of the measure is apparent, for the public good requires that the power to alienate real estate should be restricted as little as possible, and this consideration doubtless induced the legislature to depart from its original policy, which made the transfer of real estate, when owned by a parent whose minor children had property, very difficult.

The principle which allows a change of security at all, necessarily leaves the legislative power over the whole subject unabridged, and there is no right of complaint, if the legislature, in varying the nature and extent of the security, takes care that the property is preserved.

A contrary doctrine, if carried to its legitimate conclusion, would seriously interfere with the ability of the legislature to perform one of its most important duties. Charged as it is with the duty of preserving the estate of the minor, it could not change the character of the security, which it had at one period accepted as sufficient for the purpose, although it should turn out to be wholly inadequate to accomplish the object. It is not to be presumed the legislature will lessen the security, except for good cause, nor jeopard by its course of action the estate of the minor, but should such be the case, the corrective cannot be applied by this court.

By the statute in question, which was intended to benefit the minor children of Robb, and was an indirect mode of investing their means, under legislative direction, a change of security has been effected, and nothing more, and we cannot see how these minors, in the proper sense of the term, have been divested of any right in consequence of this change. Be this as it may, the legislature never contracted with them, or with any one in their behalf, not to use its power in this regard, and there being no contract to violate, there is no question in this case which this court can review.

Judgment affirmed.

YERGER v. JONES.

(16 Howard, 80-88. 1853.)

APPEAL from U. S. District Court, Northern District of Alabama.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—The appellant, John C. Yerger, a minor, suing by his next friend, filed his bill against William Brandon, setting forth that the father of complainant died in the state of Tennessee, leaving him his only child and heir at law; that his father made a nuncupative will, by which James W. Camp was appointed guardian of complainant; that Camp, acting as such, took possession of his property, and removed to the state of Alabama, where he died in 1845, insolvent. That at the time of his death, Camp was largely indebted to his ward for the use and hire of his slaves, and stated an account admitting the sum of about \$6,000 to be due. That Camp contracted with Brandon to purchase a tract of land, for the use of his ward, for the price or sum of \$8,000. That Camp paid to Brandon about \$5,000 or \$6,000 on account of such purchase, by a sale of certain property under a deed of trust. That Camp had no right, as guardian, to convert the personal property of his ward into real estate; that the price agreed to be paid for the land was exorbitant, and a large balance is still due on said contract, which the complainant is unwilling to pay in order to obtain the title. He therefore prays the court to rescind and annul the contract, to take an account of the payment made by Camp and Brandon, and decree that the amount be restored to the complainant.

The answer denies that Camp was the legal guardian of complainant, but admits that he lived in the family of Camp after he came to Alabama, and apparently under his control. That the purchase made by Camp was for a fair price, and the property transferred by him in part payment was the property of Camp and not of complainant; and that the contract was made without any view to injure or defraud the complainant, and did not have that effect; and that respondent is ready and willing to convey the tract of land to complainant, on receipt of the balance of the purchase money.

The evidence in the case does not show that Camp was appointed guardian of the complainant by his father's will, or by any competent legal authority, either in Tennessee or Alabama. But it appears that, when Camp came to Alabama, that the complainant lived in his family, and that Camp acted as his guardian, having control of his person and of his property, which consisted of negroes. Camp had a farm of nine hundred and sixty acres in Alabama, and employed the negroes of complainant to work for him, and was largely indebted to him on account thereof. He was indebted also to Brandon, and his farm was subject to a deed of trust or mortgage. To satisfy this mortgage the land was sold and bid in by Brandon for the sum of \$4,500. Some negroes belonging to Camp were also included in the mortgage, and were bid in for the sum of over \$2,000 for the use of Yerger (the complainant), and paid for by Camp. An agreement was also made between Camp and Brandon that Brandon should convey the farm purchased by him to the complainant on receiving the sum of \$8,000, being the amount of the purchase money advanced by Brandon and of the debt due by Camp to him. To secure the payment of this sum Camp gave Brandon a bill of sale, or trust deed, for a large amount of personal property, consisting of three hundred and fifty acres of cotton, four

hundred and fifty acres of corn, three hundred hogs, besides horses, mules, farming utensils, etc. Brandon was to sell this property, and apply it in payment of this contract for the land, after deducting reasonable compensation for his trouble and expenses. The defendant, in his answer, admits the amount of sales under this trust to be \$5,235.24; deducting charges and expenses, \$1,868.48, leaves a balance applicable to the purchase money of the farm of \$3,365.75.

§ 799. *A ward must look to the estate of his guardian for debts due to him; he cannot demand rescission so as to compel a third person to repay what the guardian paid him.*

The bill does not allege that there was any fraud or collusion between the parties to this transaction, or any intention to injure the complainant. Nor would the evidence in the case support any such allegation. Brandon was endeavoring to secure his own debt in a manner least oppressive to Camp, by an arrangement which would leave him in possession of the farm on which he resided. Camp was endeavoring to save something for his ward, to whom he was indebted, out of the wreck of his estate. By this transaction the remains of his personal estate were vested in a valuable property for the use of his ward, and put out of the reach of other creditors, with the incidental advantage to himself of retaining a home to himself and family. He was not converting the property of his ward to his own use, or to pay his own debts, by collusion with Brandon, but was applying his own personal property in the best manner he could to secure his ward from loss. His death has prevented his good intentions from being fulfilled to the extent contemplated. It is not easy to perceive on what principle of equity or justice the complainant can invoke the aid of a court of chancery to rescind and annul this contract, and compel the defendant to refund the amount paid by Camp on it. It is true a guardian has no power to convert the personal property of his ward into realty. Nor is the ward bound to fulfill or perform the contract made with Brandon. He has a right to hold his guardian accountable for the balance due him, and repudiate the contract made for his use. Or he may elect to take the land bargained for, but cannot demand a title from Brandon without payment of the balance due on the contract.

§ 800. *To follow trust funds, there must be a breach of trust in their transfer, and collusion between the parties.*

In Alabama and some others of the states a guardian cannot sell even the personal property of his ward without the leave of the court. By the common law, and in those states where it has not been modified by statute, he is considered as having the legal power to sell or dispose of the personal property of his ward, and a purchaser who deals fairly has a right to presume that he acts for the benefit of his ward, and is not bound to inquire into the state of the trust, nor is he responsible for the faithful application of the money, unless he knew, or had sufficient information at the time, that the guardian contemplated a breach of trust, and intended to misapply the money, or was, in fact, by the transaction, applying it to his own private purpose. The cases on this subject are reviewed by Chancellor Kent in *Field v. Schieffelin*, 7 Johns. Ch., 150. In order to follow trust funds which have been transferred to third persons there must be a breach of trust in their transfer, and a collusion by the purchaser or assignee with the guardian, executor or trustee.

If Brandon had taken the negroes belonging to plaintiff from his guardian, in payment of his debt, knowing the guardian was insolvent and abusing his

trust, a court of equity would compel him to return them to the ward or pay their full value. But in the case before us Camp was dealing with his own property, and there is no pretense of any collusion with him by Brandon in the abuse of his trust. He has received nothing which belonged to the ward, or which he is under any obligation to restore to him.

So far as the interests of the complainant were affected by this transaction, the object of it was to benefit, not to injure, him. He may therefore assume the contract, and demand a specific execution of it from the defendant, but has shown no right to rescind it, and recover the money advanced in execution of it.

The decree of the court below is therefore affirmed.

BOURNE v. MAYBIN.

(Circuit Court for Mississippi: 8 Woods, 724-742. 1877.)

STATEMENT OF FACTS.—Mary L. Bourne, wife of Joshua W. Bourne, was the daughter of Maybin, and inherited while an infant, from her mother, a number of slaves, land and other property. Her father became her guardian and rendered no regular accounts, but treated the property of his ward as if it were his own. Maybin, in December, 1868, was adjudged bankrupt, and in 1877, the bankrupt estate being still unsettled, Mrs. Bourne filed a claim against it for about \$30,000. This claim was contested by the assignee, and a reference having been made to a master, he reported that there was due to Mrs. Bourne from the bankrupt estate \$30,492.95, which report was confirmed and that amount allowed by the district court as a proven claim against the estate. The assignee appealed.

It is to be observed that Maybin was, in 1861, cited by the probate court to file an inventory and accounts. Upon his answer, stating that his ward had an undivided interest in certain slaves, and that he had been at certain expense for her tuition, appraisers were appointed, who valued the hire of the negroes against their expenses, whereupon Maybin filed a statement of his account for the preceding ten years, and showed a balance due himself. The probate court approved this account and he filed no further one; though in 1866, in response to a citation, he stated that this negro property, which was all that his ward ever had in his hands, had been destroyed; and the probate court accepted the answer and discharged him from further accounting. In 1867 the ward married her present husband, Mr. Bourne.

§ 801. *Statute of limitations does not exclude the present petition.*

Opinion by Woods, J.

The defense of the statute of limitations set up in the answer cannot prevail. The evidence shows that the petitioner was married to her present husband while an infant. She has, therefore, from her birth been under the disability of either infancy or coverture, either of which suspends the statute of limitation under the code of Mississippi. Code of 1857, art. 12, sec. 2, chap. lvii, page 400, and Code of 1871, sec. 2156.

§ 801a. *In Mississippi a ward is not concluded by the guardian's intermediate accounts with the probate court.*

Nor is the petitioner concluded by the accounts as they are styled, filed in the probate court by Maybin as guardian, and the action of the court thereon. Both were filed during the infancy and before the marriage of the ward, and

were passed upon without any notice to her. Neither of them are final accounts, but are expressly stated to be annual accounts.

§ 802. *The final settlements of a guardian are open to examination, and do not conclude the ward until, after notice, they are approved by the court.*

Such accounts are not conclusive on the ward. The code of 1857, art. 148, chap. lx, provides for a final account by the guardian after his trust has ceased, either by the marriage or majority of the ward. "And the guardian shall also make a final settlement of his guardianship by making out and presenting to the court, under oath, his final account, which shall contain a distinct statement of all the balances of his annual accounts, either as debits and credits, and also all other disbursements, charges and amounts received and not contained in any previous annual account." The code then proceeds to declare that such account shall be open to the inspection of the ward, and the court shall fix a day for hearing the same, and shall cause notice thereof to be given to the ward to appear and show cause why the final account of the guardian should not be allowed and approved. At the appointed time the court shall proceed to examine the final account and to hear the proofs for and against it, "and if the court shall be satisfied, after full examination, that the account is just and true, it shall make a final decree of approval, ratifying and confirming the guardianship, or it may allow only so much of the account as seems right," etc.

These provisions make it perfectly clear that on the filing of a final account the whole administration of the trust, and all the annual accounts and the inventories, are subject to challenge and examination. The absurdity of binding an infant by an annual or partial account, passed upon by the probate court without notice, finds no place in the jurisprudence of this state, and so the supreme court of the state has repeatedly held. *Austin v. Lamar*, 1 Cush. (Miss.), 189; *Harper v. Archer*, 9 Sme. & Mars., 71; *Coffin v. Bramlitt*, 42 Miss., 194.

§ 803. *The claim of a ward against his guardian is a debt provable against the guardian in bankruptcy.*

It is next contended by the defendant that the claim of the petitioner is not of such a nature as to be provable against the bankrupt estate; that only debts, and debts which were in existence at the date of bankruptcy, can be proven; and that as between guardian and ward, the relation of debtor and creditor does not exist until there has been a final accounting in the probate court, and a balance found due the ward. If this proposition were true, then the claim of every ward or other beneficiary of a trust whose guardian or trustee was adjudged a bankrupt before settlement of the trust would be excluded from participation in the proceeds of the bankrupt estate.

§ 804. *The relation of debtor and creditor between a guardian and the late ward arises as soon as the guardianship ceases.*

A conclusive answer, however, to this theory of the defense is found in the code of Mississippi, which declares (Code of 1857, art. 148, chap. lx, page 462) that "the powers and duties of every testamentary or other guardian over the person and estate of his ward shall cease and be determined when such ward shall arrive at the age of twenty-one years, or be lawfully married, and in either event the guardian shall forthwith deliver up to the ward or to the husband, as the case may require, all the property of every description of said ward in his hands, and on failure shall be liable to an action on his bond."

Clearly, this provision of the code raises the relation of debtor and creditor

between guardian and his late ward as soon as the guardianship ceases. Mrs. Bourne was married, and the powers of the guardian, as such, ceased more than a year before the bankruptcy of the latter, and he was liable to suit in any court of competent jurisdiction for the recovery of the amount which might be due from him to his ward. The relation of debtor and creditor must, therefore, have existed between them as soon as the guardianship was terminated by the marriage of the ward.

§ 805. *The fact that the guardian's accounts were in course of settlement in the probate court does not exclude the ward from proving her claim in the court of bankruptcy.*

Another objection to the proof of the petitioner's claim, similar to the one just considered, is that the debt of the petitioner is not a provable one, because her claim is pending and undetermined in a court, to wit, the probate court, which has full jurisdiction thereof. We think this objection is fully answered by the case of *Payne v. Hook*, 7 Wall., 425. In that case, Anne Payne, a citizen of Virginia, filed her bill in the circuit court of the United States against Hook, public administrator of Calloway county, Missouri, and the sureties on his bond, to obtain her distributive share in the estate of her brother, Fielding Curtis. The bill charged gross misconduct on the part of the administrator and false settlements with the probate court, and it appeared from the bill that Hook had not yet made his final settlement with the probate court. The bill was demurred to because, among other grounds, the probate court had exclusive jurisdiction concerning the duties and accounts of administrators until final settlement, and the administration complained of was still in progress, and resort should be had to that court to correct the accounts of the administrator, if fraudulent or erroneous.

In reply to this objection to the bill, the supreme court said: "The circuit court of the United States for the district of Missouri had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it." "The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses, is subject to neither limitation or restraint by state legislation, and is uniform throughout the different states of the Union."

§ 806. *Jurisdiction of courts of bankruptcy.*

These remarks apply with pertinency to the jurisdiction of the bankrupt court, and to the facts of this case. The jurisdiction of the bankrupt court depends upon the act of congress. It cannot be controlled or limited by state legislation. It is uniform, and is required by the constitution to be uniform throughout all the states. Section 711 of the United States Revised Statutes declares "that the jurisdiction vested in the courts of the United States of all matters and proceedings in bankruptcy shall be exclusive of the courts of the several states;" and section 4972, "that the jurisdiction conferred upon the district courts, as courts of bankruptcy, shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy." Section 5106 declares "that no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; . . . provided, that if the amount due the creditor is in dispute the suit may, by leave of the court in bankruptcy, proceed to judgment for the purpose of ascertaining the amount due."

These citations from the statutes clearly show the jurisdiction of the bankrupt court to ascertain the amount of a claim against the bankrupt estate, and the fact that the claim may be in suit in another court does not divest it of that jurisdiction. It is true that the bankrupt court could not arrest a suit brought against the debtor to recover a debt which the bankruptcy would not discharge, but it clearly has the jurisdiction to ascertain for itself the amount of the debt, where it is called on to apply towards its payment a part of the assets of the bankrupt estate.

Where a bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods wrongfully taken, converted or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. Revised Statutes, section 5067. It seems clear, then, that the petitioner had a provable debt against the estate, for immediately on her marriage she might have maintained a suit against her guardian, upon his bond, in any court of competent jurisdiction, to recover whatever might be due her from him, and the fact that the probate court had jurisdiction to ascertain the amount did not oust the jurisdiction of the bankrupt court to do the same thing.

§ 807. *A decree in favor of a ward against her guardian does not merge her claim against the estate of the bankrupt.*

It is next objected to the claim of petitioner, that in November, 1869, she commenced a suit against her late guardian, Maybin, in the chancery court of Warren county, Mississippi, for a final settlement of his guardianship, and, on April 22, 1873, obtained a decree against him for \$20,609, and it is claimed that the debt being merged in the decree, neither the decree, nor the original debt on which it was founded, can be proven against the bankrupt estate.

Many authorities are cited to show that the debt or claim on which a judgment is based is merged in the judgment. This is of course the general doctrine, and is not disputed. The rule of merger is that no further action can be prosecuted between the same parties upon a matter already ripened into judgment. There is no offer in this case to establish the debt by proof of the decree against Maybin, rendered by the state court. The proof offered is evidence to establish the claim upon which that decree was founded. Can this be admitted?

I think it clear that the claim presented against the bankrupt estate is not merged in the decree against the bankrupt. The decree is against the bankrupt, founded on a fiduciary debt which his bankruptcy does not discharge. The claim sought to be established in this case is a claim against the estate of the bankrupt. There can be no merger unless both the bankrupt and the assignee are concluded by the decree of the state court. It is clear that the assignee is not concluded, for he was not a party to the decree. As to him the proceedings and decree of the state court were *res inter alios acta*. When the decree is presented as a claim against the bankrupt estate, he clearly has the right to contest it, and insist that he is not bound by it, and to require the creditor to make good his claim by proof. He cannot be bound by a decree to which he was not a party.

So neither is the bankrupt, in a suit brought against him to recover the amount of a fiduciary debt which is not discharged by the bankruptcy, bound by the allowance of the claim by the bankrupt court. So far as such a debt is concerned, the assignee in no degree represents the bankrupt, and when suit is brought against the latter to establish the claim against him, and to be en-

forced against his subsequently acquired property, he may well say, I have had no day in court on this claim, and insist on his right to contest. The great majority of claims against a bankrupt estate are not contested; they are allowed upon the *ex parte* proof of the creditor. To say that such an allowance would be binding upon the bankrupt in a suit brought to recover a fiduciary debt not discharged by the bankruptcy seems clearly untenable.

The decree in the state court against the bankrupt, and the allowance of the claim for the sum demanded by the bankrupt court, are entirely independent of each other. They are proceedings instituted for different purposes, and against different parties. The doctrine of merger does not apply. The bankrupt is not bound by the allowance of the claim by the bankrupt court, and the assignee is not bound by the decree of the state court. It is true that there are authorities of the highest respectability which have held that if, after the institution of proceedings in bankruptcy, judgment is recovered on a provable debt, the original debt is merged and extinguished in the judgment, and the judgment is not provable against the estate of the debtor, nor discharged by the certificate. *Bradford v. Rice*, 102 Mass., 472; *Cutter v. Evans*, 115 Mass., 27; *In re Gallison*, 5 B. R., 353; *In re Mansfield*, 6 B. R., 388; *Holbrook v. Foss*, 27 Me., 441; *Pike v. McDonald*, 32 Me., 418; *Sampson v. Clark*, 2 Cush., 173.

These decisions are placed on the doctrine of merger, which we have seen does not apply here, and because the creditor, by taking judgment and so changing the form of the debt and securing to himself the benefit of conclusive and permanent evidence of it, and an extension of the period of limitation thereon, is held on his part to have elected to look to the debtor personally and to abandon his right to prove against the estate, and the debtor, on the other hand, who might have protected himself by moving the court in which the action was pending for a continuance, in order to afford him an opportunity to obtain and plead a certificate of discharge, is held, by omitting to make such a motion before judgment, to have waived the right to set up his certificate against the plaintiff's claim, and, therefore, the rights of the parties must be governed by the judgment which one has moved for and the other has suffered to be rendered.

It is evident that these reasons do not apply to a claim based on a fiduciary debt which is not discharged by the bankrupt act. The bankrupt law expressly provides (R. S., sec. 5117) that "no debt created by the bankrupt . . . while acting in a fiduciary capacity shall be discharged by proceedings in bankruptcy, but the debt may be proved and the dividend thereon shall be a payment on account of such debt." Here seems to be a clear authority to such a creditor to pursue both remedies, to prove his debt and to prosecute his action against the bankrupt. And in *Lamp Chimney Co. v. Brass and Copper Co.*, 91 U. S., 656, it was held that proof of a debt not barred by the bankruptcy does not preclude an action against the bankrupt thereon, and the converse seems to follow inevitably, that suit brought against the bankrupt does not preclude proof of such a debt against the bankrupt estate. It cannot, therefore, be said that, by electing to pursue one remedy, he abandons the other, when the law gives him both. Nor can it be said that the debtor, by not interposing his discharge as a defense to the action against him, waives his right to set up his certificate against the plaintiff's claim, for he has no such right, and therefore cannot be said to waive it.

On the other hand, the weight of authority seems to be in favor of the

proposition that the taking of judgment by a creditor pending proceedings in bankruptcy does not prevent the plaintiff in any case from proving his claim. *Clark v. Rowling*, 3 N. Y., 216; *Munroe v. Upton*, 50 N. Y., 593; *Harrington v. McNaughton*, 20 Vt., 293; *Downer v. Rowell*, 26 Vt., 397; *In re Brown*, 3 B. R., 584; *In re Vickery*, 3 B. R., 696; *In re Stevens*, 4 B. R., 367; *In re Rosey*, 8 B. R., 509. But whichever way the authorities may preponderate on this question, no case can be found which decides that a judgment after bankruptcy, on a debt not barred by the bankruptcy, precludes proof of the claim in the bankrupt court.

My conclusions are, therefore, (1) that the decree rendered against Maybin after his adjudication upon a fiduciary debt which is not barred by the bankruptcy does not bar the proof of the claim in the bankrupt court; and (2) that the claim of the creditor against the bankrupt estate is not merged in the decree in his favor against the bankrupt; and (3) that as the assignee was not a party to the decree against the bankrupt, he is not concluded by it, and may insist that the creditor shall prove his claim by other evidence than the record of the decree, and as the assignee has insisted on such proof in this case it was properly offered and received.

These conclusions being reached, it only remains to consider whether the report of the master, finding the amount of the claim in favor of the petitioner to be \$30,492.95, should be sustained. Upon this finding three questions of law arise: 1. Whether Maybin should be credited with any payments made by him for the support and education of his ward, she being his daughter; and 2. Maybin being a tenant by the curtesy of certain lands, the fee of which was in his ward, and having made certain payments to discharge a mortgage incumbrance thereon, what credit should he be allowed for such payments in his accounts with his ward. 3. Whether Maybin should have been charged with interest on any balances which might be found in his hands.

§ 808. *A father, if able, must support his child. Discretion of the court in case the child has property.*

Of these three questions in their order: 1. The evidence shows that Maybin, during the greater part of the time while he was guardian for his ward, was a man of large means. The general rule is that, if a father be guardian, he must support his child, if of sufficient ability to do so. *Reeves' Domestic Relations*, 283. It is, however, within the discretion of the court to allow the father who is guardian a sum out of his ward's estate in payment of his support of the ward.

It appears from the record that the probate court, in 1861, consented to allow Maybin his expenditures in behalf of his ward out of her estate. Although the safe and proper course for the guardian would have been to obtain the consent of the court to this arrangement in advance, yet the court having sanctioned the expenditure after it was made, I am of opinion that Maybin should be allowed all the expenditures in behalf of his ward which the testimony satisfactorily establishes.

Maybin's own testimony on this subject is loose and unsatisfactory. He produces no vouchers and gives no dates. In my judgment, the only money expended for his ward which he proves is a payment of \$500, made to his ward's grandfather in her behalf. This payment is corroborated by the witness Brian, otherwise I should not consider it as satisfactorily proven. I think, therefore, that Maybin should be allowed a credit for \$500, as of the 31st day

of December, 1857, the latest date to which the testimony of the witness Brian could apply.

No other payments are shown by Maybin to have been made on behalf of the ward, and no other credits ought to be allowed him by reason of alleged expenditures in her behalf.

§ 809. *Where land is charged with an incumbrance, the rule of equity is that each portion should bear its part of the burden.*

2. The evidence shows that Maybin was the tenant by the curtesy in a tract of land of which his daughter and ward was seized in fee. At the time Maybin's life estate commenced he was about twenty-three years of age. Within a year or two after the inception of said life estate, Maybin, as reported by the commissioner, paid, to relieve said real estate of a mortgage incumbrance left upon it by the ancestor of his ward, the sum of \$9,250, to which the commissioner added interest in the sum of \$11,402.95, making the principal and interest \$20,652.95. Half of this sum, to wit, \$10,326.47, the commissioner allowed as a credit to Maybin. His counsel claims that he is entitled to a credit for the whole sum, principal and interest.

It is true that the personal property is the primary fund for the payment of the debts of a decedent's estate, and that, in general, the heir of a mortgagor or the devisee of his real estate may call upon the executor or administrator to discharge the mortgage on the real out of the personal estate, and this rule is extended to a widow in favor of her dower in an estate mortgaged to secure the purchase money. Crabb's Real Prop., 914; Cope v. Cope, 2 Salk., 449; Brown's Maxims, 560; Henagan v. Harlec, 10 Rich. Eq., 285; Cumberland v. Coddington, 3 Johns. Ch., 229. But the principle is adopted in favor of the heir devisee and dowress alone (Coote on Mortg., 467, 468; Cope v. Cope, *supra*; Torr's Estate, 2 Rawle, 250; Mansell's Estate, 1 Parsons' Eq. Cases, 367), and has no application to the respective rights of the remainder-man and tenant for life or for years.

§ 810. *A tenant for life is bound to keep down the interest on an incumbrance, but not to pay the principal.*

The general rule in equity is that, where land is charged with a burden, each portion of the estate should bear its equal share of such charge. Stevens v. Cooper, 1 Johns. Ch., 425; Story's Eq. Jur., sec. 477; Cheesebrough v. Millard, 1 Johns. Ch., 409; Gibson v. Crehore, 5 Pick., 145.

Where the incumbrance is on the entire estate, and there is a tenant for life, he is bound to keep down the interest, but not to pay any part of the principal. If, for example, there is a tenant for life and a remainder-man in fee of an estate, subject to a mortgage which is due and must be paid at once to save foreclosure, and the remainder-man, to save the estate, pays the mortgage, he is not obliged to take the share of the tenant for life in annual instalments of interest, to continue as long as he shall live. He is entitled, as equitable assignee of the mortgagee, to immediate payment, and the sum which he thus has a right to claim is the present worth of an annuity equal to the amount the annual interest would be, computed for the number of years which the tenant will live. This is assumed by the courts to be fixed for this purpose by the tables of longevity. Whatever this sum may amount to is deducted from the gross amount paid for redemption, and the balance is the proportion to be paid by the remainder-man. Of course the same rule of computation is applied if the tenant redeems and calls on the remainder-man

for contribution. 2 Washburne on Real Property, 197; Swaine v. Perine, 5 Johns. Ch., 482; Gibson v. Crehore, 5 Pick., 145; Houghton v. Hapgood, 18 Pick., 154; Squire v. Compton, 2 Eq. Cas. Abr., 387; Foster v. Hilliard, 1 Story, 77; Carll v. Butman, 7 Me., 102, 105; Jones v. Sherrard, 2 Dev. & Bat. Eq., 179.

§ 811. *Rule of contribution between tenant by the curtesy and remainder-man where the relation of father and child, and of guardian and ward, exists between them.*

This is the rule applicable to this case. The proposition that a tenant by the curtesy, who happens to be the guardian of the remainder-man, can apply his ward's estate to remove an incumbrance from the property in which he holds by the curtesy, and charge his ward with both the principal and interest of the sum so paid, is entirely without foundation, and has no support in any adjudicated case. Applying the rule above laid down, to ascertain what portion of the \$9,250 paid by Maybin to remove the incumbrance on the land in which he held a life estate he was bound to contribute, and taking his age at the time of payment to be twenty-three years, and computing interest at six per cent., the rate fixed by law in this state, it turns out that Maybin's proportion of the sum paid was \$5,772, and his ward's portion \$3,478. For this latter sum, with interest from the date of its payment, Maybin is entitled to a credit. As the commissioner has allowed a sum considerably larger than this, he cannot complain.

§ 812. *When guardian is liable for interest.*

3. It is next to be considered whether Maybin was chargeable with interest upon the amounts realized from the estate of his ward. The general rule on this subject is thus laid down in Perry on Trusts: "If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest, or if he mingles the money with his own, or uses it in his private business, or neglects to settle his account for a long time, he will be liable to pay simple interest at the legal rate." Vol. 1, sec. 468.

The report of the commissioner shows that Maybin received slaves of his ward, in September, 1851, whose clear yearly hire amounted to \$1,325, and other personal property of the gross value of \$4,350. Maybin's report, filed in August, 1861, shows that up to that time he had filed neither inventory nor account, but had used his ward's property as if it were his own, and employed it in his own business. Under this state of facts he is clearly liable for interest on the hire of the slaves as it accrued from year to year, and for the interest on the value of the other personal property, unless relieved by the law of this state.

The code of Mississippi of 1857, pages 461, 462, provides (after requiring the guardian to file annual accounts) as follows: "And for no balance of money in his hands, on such accounts, shall a guardian be charged with interest, but the court may direct him to place the same at interest." It is perfectly apparent that this provision was not intended to apply to a case like the present. Here the guardian, who is in receipt of a yearly income from the estate of his ward, files neither inventory nor account for ten years, and then makes a grossly false statement of the condition of his ward's estate, giving no detailed account of the assets of his ward, or of his expenditures in her behalf, falsely stating the amount of her property at less than one-half what it really was, and giving a palpably false and exaggerated statement of his expenditures in her behalf, thus making it appear that there was nothing due her,

when in fact a large sum was due. Clearly, this is not the case in which the code intended to relieve the guardian from the liability for interest, and the commissioner was right in charging interest.

§ 813. *All presumptions are against a trustee who keeps no accounts.*

It remains to pass upon the correctness of the sum found due from Maybin to his ward by the commissioner. "A trustee is bound to keep clear, distinct and accurate accounts. If he does not, all presumptions are against him, and all obscurities and doubts are to be taken adversely to him." *Blauvelt v. Ackerman*, 23 N. J. Eq., 495. "Trustees cannot use trust moneys in their business, nor embark it in any trade or speculation. If a trustee makes such use of the money he will be responsible for all loss, and he may be compelled to pay the highest rate of interest." *Perry on Trusts*, sec. 464.

Applying these rules to the case in hand, it is impossible to say that the commissioner has reported too large a sum against the guardian. The estimate made by the commissioner, of the amount which should have been received for the hire of slaves, seems to be supported by the testimony, which would have justified a much higher valuation. His estimate of the value of the personal property, other than slaves, which came to the hands of the guardian, and was appropriated by him as his own, is also borne out by the evidence. Besides, the commissioner has allowed the guardian \$1,641 more than he should for removing the mortgage incumbrance on the property subject to his life estate, and he has omitted to charge interest against the guardian for the four years of the war. As the guardian had appropriated the trust estate to his own use, and treated it from the beginning of his guardianship as his own, there is no ground for this omission. He is chargeable with interest from the time he appropriates his ward's property until he accounts and pays for it.

I do not go into a minute discussion of the evidence on which the commissioner based his conclusions, because his report is presumed to be correct until error is made to appear. This has not been done. Even allowing the guardian a credit for the \$500 which it is shown he paid towards the maintenance and education of his ward, and interest on this sum, the balance found by the commissioner is too small when his mistake in the amount allowed for satisfying the mortgage on the ward's lands, and his failure to charge interest during the war, are taken into consideration. The amount actually due the petitioner is considerably larger than the amount reported. As the sum reported will more than absorb all the assets of the bankrupt estate, the petitioner does not ask for any modification of the decree.

In my judgment the claim of the petitioner against the bankrupt estate of Maybin, for the amount found due by the district court, is according to law, is sustained by the evidence, and the finding and allowance of the district court should be affirmed. Ordered accordingly.

MICOU v. LAMAR.

(Circuit Court for New York: 17 Blatchford, 878-889. 1880.)

Opinion by CHOATE, J.

STATEMENT OF FACTS.—This is a suit brought by the plaintiff's testatrix, Ann C. Sims, in the supreme court of the state of New York against the defendant, as executor of Gazaway B. Lamar. The case was removed into this court by the defendant, and the plaintiff having died, the suit was revived in the name of the present plaintiff, her administratrix.

The complaint alleges that, on the 21st day of December, 1855, the defendant's testator, Gazaway B. Lamar, was duly appointed, by the surrogate of Richmond county, guardian of the said Ann C. Sims, then an infant of about four years of age, and then residing in said county of Richmond; that he accepted said trust and gave bond as required by law; that, on or about January 1, 1856, he took into his possession all the property of said infant, being more than \$5,000, in cash and other property; that he never, during his lifetime, rendered an account of said guardianship to the surrogate of Richmond county; or to any court having cognizance thereof, or to the plaintiff; and that the said infant has become of full age, and has demanded an account, which the said guardian and his executor have neglected to give. The prayer of the complaint is for an account and payment of the balance found due.

The answer of the defendant avers that the said Gazaway B. Lamar was a citizen of Georgia, and said infant was a citizen of Alabama, having a temporary residence in the city of New York, when the said Lamar was appointed guardian of said infant, as alleged in the complaint; that, in the year 1861, the states of Georgia and Alabama declared themselves to have seceded from the United States, and to constitute members of the so-called Confederate States of America, whereupon a state of war arose between the United States and the Confederate States, which continued to be flagrant for more than four years after the spring of 1861; that the said Lamar and Ann C. Sims were, in the spring of 1861, citizens and residents of Georgia and Alabama, respectively, and citizens of the Confederate States, and were engaged in aiding and abetting the state of Georgia and the Confederate States in their rebellion against the United States, and so continued till January, 1865; that the United States, by various public acts, declared all the estate and property of the said Lamar and the said Ann C. Sims to be liable to seizure and confiscation, and they were outlawed and debarred of any access to any court of the United States, whereby it was impossible for the said Lamar to appear in the surrogate's court of Richmond county to settle and close his accounts there, and to be discharged of his liability as guardian, in consequence whereof the relation of guardian and ward ceased and determined, so far as the same depended upon the order or decree of said surrogate's court; that, for the purpose of saving the money and property of said Ann C. Sims from seizure and confiscation by the United States, the said Lamar, at the request of said Ann C. Sims, and of her natural guardians, all citizens of Alabama, withdrew the funds belonging to her from the city of New York, where they were declared to be forfeited and confiscated, and invested the same, for her benefit and account, in such securities as, by the laws of Alabama and Georgia and of the Confederate States, he might lawfully do; that, on the 15th day of March, 1867, at the written request of said Ann C. Sims, and of her natural guardians, one Benjamin H. Micou was appointed her legal guardian by the probate court of Montgomery county in the state of Alabama, where she then resided; that said Lamar accounted with, and paid over to, said Micou, as guardian, all the estate with which he was chargeable as guardian, and received from said Micou, as guardian, a full release therefor; and that the said Ann C. Sims ratified and confirmed the same when she became of age.

A similar suit was brought by Ann C. Sims, as administratrix of Martha W. Sims, her sister, of whom the said Lamar was at the same time appointed guardian. Martha W. Sims died in 1864, at the age of fifteen years, unmarried and intestate, leaving the said Ann C. Sims her next of kin. The

complaint in such second suit states a cause of action similar to that stated in the suit of Ann C. Sims. The answer in that case states the same defenses, of the dissolution of the relation of guardian and ward by the war, and the withdrawal of the funds to save them from confiscation. It also avers that all the rights of Martha W. Sims vested at her death in Ann C. Sims, and that the settlement with Micou, as guardian, and his release, discharged the said Lamar from all liability as guardian of Martha W. Sims.

After the revival of these suits in the name of the present plaintiff, cross-suits were commenced in this court by the defendant against the present plaintiff, setting up the same defenses as in his answers to the original complaints, and further averring that the present plaintiff is the sole legatee under the will of Ann C. Sims, and entitled to receive, in her own right, whatever shall be recovered in these actions; and that the present plaintiff, as one of the natural guardians of said infants, approved and ratified all the acts of said Lamar as their guardian, and is, therefore, estopped to deny that those acts were in all respects legal and proper. The present plaintiff, in her answers in the cross-suits, denies that she was one of the natural guardians of said infants, and denies the approval and ratification of the acts of the guardian.

The four suits have been tried together upon an agreed statement of facts.

The appointment of the defendant's testator as guardian of the two infants by the proper court of the place of their domicile at the time of the appointment, and his receipt soon afterwards of moneys belonging to his wards, are admitted. The condition of his bond, which is made a part of the complaint, is that he "will faithfully in all things discharge the duty of a guardian according to law, and render a true and just account of all moneys and property received by him and of the application thereof, and of his guardianship in all respects to any court having cognizance thereof when thereunto required." The letters of guardianship appoint him "the general guardian of the person and estate of said minor until she shall arrive at the age of fourteen years, and until another guardian shall be appointed," and require him "to safely keep the real and personal estate of said minor, and not to suffer any waste, sale or destruction of the same," etc., "and to deliver the same to her when she becomes of full age, or to such other guardian as may be hereafter appointed, in as good order and condition as when received, and also to render a just and true account," etc., "in any court having cognizance thereof when required."

§ 814. *That guardian and ward were in the Confederate lines during 1861-65 does not absolve the former from accounting.*

The court to which the ward resorted for an account and relief was a court of general equity jurisdiction, and, therefore, a court having cognizance thereof, and the causes of action alleged in these complaints are fully sustained by these admitted facts, unless the matters alleged in the answer are, if sustained by the evidence, valid defenses to the guardian.

(1) The first ground of defense insisted on is that by the war the relation of guardian and ward was terminated. Hence, it is argued that though the former guardian continued to hold upon some kind of a trust, the assets which he had received as guardian, yet he no longer held them as guardian under and according to the laws of New York; that the guardian and ward having both acquired new domiciles out of this state, and within the territory of what became, at least pending the war, an alien and a hostile state, this personal domestic relation was thereby wholly broken, and did not revive when the war

ceased, and the guardian was no longer accountable to the courts of New York as guardian, even after the close of the war. I can see no ground whatever for this position, so far as concerns the care and safe keeping of the property of the ward in the hands of the guardian, and his liability to account for it after the war was over. Doubtless, during the war, if the guardian had remained here and his ward had become an alien enemy, his duties as guardian would be modified by that fact. He could not properly or legally remit funds for her support to any person in the hostile territory. But he would still be under the same obligation as before, as to the safe keeping of the property, and, whenever the ward ceased to be an alien enemy, by the termination of the war, there was no legal obstacle to her calling the guardian to an account for the property so held. Even if the war dissolved the relation, the effect of such dissolution would not be greater than would be that of the termination of the guardianship by the death of the ward, and, if the ward had died before the war began, the guardian must still account to her legal representative. If he ceased to be guardian he still remained a trustee of the property, upon precisely the same trusts as to its safe keeping and under the same liability to account for it, according to the tenor of his appointment and bond, as before. The case of a copartnership between citizens of hostile states being dissolved by war is cited as controlling this case. If it were wholly analogous, which it does not seem to be, I do not perceive that it would touch the present question. By the acceptance of his appointment and his bond, the defendant's testator undertook and agreed to do certain definite things with the funds he received, to keep them invested in a certain way, which the law prescribes, and to account for them when required. It is alleged that he has failed to do so. It certainly is no answer for him to say that, of his own free will, he made himself an alien enemy of the state of New York and of the United States, and thereby discharged himself from the obligation thus assumed under the laws of New York. Yet this is what this defense amounts to, so far as it rests on his becoming a resident of Georgia, and, as such, engaging in the war against the United States. So far as this defense rests on the ward's being an alien enemy, her right to call him to account in respect to the funds received by him as guardian before the war was suspended, not annulled, by the war. In *Insurance Co. v. Davis*, 95 U. S., 425, 430, the supreme court says: "If the agent has property of the principal in his possession or control, good faith and fidelity to his trust will require him to keep it safely during the war, and to restore it faithfully at its close." If this is so of an agent, it must certainly be said with equal force of a guardian, that good faith and fidelity to his trust will require him to keep his ward's money and its accumulations safely during the war, and to account for it at its close. Nor can the guardian better his position, in this respect, by himself voluntarily going into rebellion, as this guardian went from New York to Georgia to join in a rebellion, for he could not, by any act of his own, short of the complete discharge of his duty, relieve himself from his liability.

§ 815. *Apprehension of loss by confiscation does not excuse the guardian from investing in permitted securities and accounting for the fund.*

(2) The next defense urged is that the guardian, to prevent the confiscation of the ward's money, withdrew it from its investment in bank stock in New York, and sent it to Montreal, Canada, where it remained invested, by his direction, in the bonds of cities within the rebel states and in southern railroads. This point is clearly untenable. It is not contended that the new investments

made were such as a guardian is allowed to make according to the laws of New York, and they were, obviously, extra hazardous. They are not to be justified on the plea that, if the funds had remained here invested according to law, they would be liable to be confiscated by the United States. It is no part of the duty of a guardian to protect his ward's money against the lawful demands of his own government. If, under such lawful demands, they are seized the guardian would no longer be responsible for them. His duty, as a citizen, to interpose no obstruction to the efforts of his own government in carrying on war, is his first duty. It is superior to any obligation he owes to his ward. If his ward's money was forfeited to the United States, he had no right nor duty to prevent, by its removal, the superior rights of the government over it from being asserted. Moreover the proofs show that what he did was, under color of protecting his ward's interests, to allow the funds to be loaned to cities and other corporations which were aiding in the rebellion, and, by this very act set up in excuse, he gave aid and comfort to the enemies of his government. Such an act could not be pleaded in justification, because in itself unlawful, even if the circumstances warranted a removal of the fund to avoid confiscation, which, clearly, they did not.

§ 816. *A guardian is responsible on his original obligation, although entitled to credit for actual payments to a new guardian lawfully appointed in another jurisdiction.*

(3) Another ground of defense set up is the transfer of what remained of the fund, in 1867, to a new guardian in Alabama, and his alleged release of the defendant's testator. At the time of the appointment of Mr. Micou guardian by the Alabama court, the infant, Ann C. Sims, was domiciled in that state. The appointment was made upon her written request, and, as it appears by the statutes of Alabama put in evidence, it was in all respects in conformity with those statutes, and by a court of competent jurisdiction. It is objected, on the part of the plaintiff, that a new guardian cannot be appointed till the former guardian is removed or superseded. This may be the rule where both guardians are appointed within the same jurisdiction. There seems, however, no legal objection to there being several guardians in several different states, if the infant has property in different states, which requires the care of a guardian. The defendant's testator was appointed guardian of the person and property of the infants. When they removed from the state of New York, which they did, with the relatives with whom they lived, in the year 1856, his duty and power as guardian of the person may have ceased or been suspended, at least until they might return, on the ground that his appointment under the laws of New York would give him no power to control their persons beyond the local jurisdiction of those laws; and when the infants became, as they did, domiciled in Alabama, I think the power of the state of Alabama to provide, by law, for the appointment of a guardian of their persons, and of such property as they might have within its jurisdiction, cannot be questioned. The fact that there was already a guardian of some of their property in another state or country is not inconsistent with the exercise of this power; and it would, certainly, be most proper and, in many cases, convenient and for the true interest of the infant, that, in case of a change of domicile, a new guardian should be appointed within the new jurisdiction; and a transfer of funds from a former guardian to the new guardian appointed in the state of the infant's domicile, might, also, be very properly authorized by the court to which the former guardian is accountable, upon the same principles of equity and

comity on which the transfer of funds in the hands of an executor or administrator, to an executor or administrator in another state, may be authorized. *Parsons v. Lyman*, 20 N. Y., 103. In the present case, the former guardian, Mr. Lamar, requested of the near relatives of the infant the appointment of a new guardian. His reasons were his age and growing infirmities, and his own business cares and perplexities; and the appointment was asked for and made in accordance with this request. The reasons were valid and sufficient, and the circumstances made it proper that the new guardian should be appointed in Alabama; and I cannot doubt that, if the defendant's testator had applied to the surrogate's court of Richmond county for leave to resign his trust and to transfer the ward's estate to the duly appointed guardian in Alabama, his petition would have been granted. What would thus have been approved as just and right, if asked for, can now be justified as done for the benefit of his ward. Therefore, in any accounting to be had, the defendant's testator should be credited with his cash payment to the new guardian, of \$808.70. But beyond this the transaction referred to as a settlement with and release of the defendant's testator by the new guardian, neither purported to be nor could, if so understood and intended by the parties, be a release of the former guardian from his liability to account for the residue of the infant's estate with which he was chargeable. The new trustee merely gave a receipt for sundry securities, mostly worthless, which the defendant's testator turned over to him. They were the remains of the investments which had been made of the ward's property. But the original investments being in bank stock had been not such as the ward was, when of age, bound to accept; and, by the changes of value effected by the war, and by the investments made in consequence of the war and during the war, the result was that the rest of the fund consisted of bonds of southern cities and southern railroads of little value. It is too plain for argument, it seems to me, that a new guardian has no power to accept a transfer of such properties as a full discharge of the former guardian's liability to account for and make good the moneys originally received. Such an act would be a gross abuse of his trust by the new guardian. No court would authorize or justify it, and certainly a guardian has no power, by virtue of his appointment, thus to give away the property and rights of his ward. If the new guardian has actually realized anything from the securities transferred, I see no reason why, in the taking of the account, the defendant's testator should not be credited with it.

§ 817. *Facts which do not constitute ratification by the ward.*

(4) The defense of a ratification by the ward is not made out by the evidence. Such a ratification must be very clearly proved, and it must appear that it was made with full knowledge of all the facts and a full understanding of the legal rights of the ward affected thereby. *Adair v. Bremmer*, 74 N. Y., 539, 554. Neither of these circumstances is shown in this case. It is true that Ann C. Sims in 1867 made a written request for the appointment of a guardian in Alabama in place of her former guardian. She was then about sixteen years old. She became of age June 1, 1872, and commenced this suit July 1, 1875. She was not shown to have meanwhile done any act waiving her claim. It is true that her uncle and aunt Micou, with whom she lived, had written letters expressive of their gratitude to the defendant's testator for doing as well by their niece as he had done; but those letters do not bind the ward, and, if they did, they are not shown to have been written with a full knowledge of the ward's rights.

§ 818. *Admissions of next of kin, who afterwards becomes administratrix, do not bind her in that capacity.*

(5) The additional defense set up in the cross-suits is, also, untenable. Mrs. Micou, the present plaintiff, at the time the alleged acts of approval by her were done, did not stand in the relation of a natural guardian to the infants, having any power, as such, over their estate. She was their aunt, and, after the death of Martha W. Sims, she was one of the next of kin of the surviving infant, Ann C. Sims. A guardian upon whom the law throws the real responsibility for the proper and legal investment of his ward's money cannot relieve himself from that responsibility by pleading the advice, direction or approval of his ward's relatives, however near; and Mrs. Micou, before the death of Ann C. Sims, had no such interest in her estate as would make her admissions and acts binding on her when afterwards she became the administratrix of Ann C. Sims. Nor is the evidence of ratification and approval satisfactory, even in respect to the present plaintiff, for the reasons above stated.

§ 819. *A ward may reject improper investments; adjustment with the guardian.*

(6) Although the defendant's testator acted without any other real purpose, as it seems, than to do what he thought for the best interest of his ward, yet he took the risk of investing the funds in a manner not allowed by law, and he must, therefore, make good the amount received, with interest and annual rests. *King v. Talbot*, 40 N. Y., 76. The fact that down to the time of the war there had been no depreciation in fact is immaterial. The ward may now elect to reject the investment altogether. The guardian is to be allowed all payments made by him for the support and education of the infants as the same appear on his accounts rendered, which are admitted to be in that respect correct.

§ 820. *Points to be further considered when an account is presented.*

(7) The defendant's testator received for his wards, from time to time, a certain proportionate part of the dividends on stock of the Mechanics' Bank, a Georgia corporation. The plaintiff insists that the defendant's testator should be charged with the infants' proportionate part of the value of this stock. The evidence is not sufficient to show what interest, if any, the infants had in this stock, or whether the defendant's testator could, by appropriate proceedings in the courts of Georgia, for ancillary letters of guardianship, or otherwise, have obtained possession, as guardian, of this interest. If he could have done so, it seems that it would have been his duty to do it. *Schultz v. Pulver*, 11 Wend., 361. But this question will more properly arise when an account shall have been taken and the facts are all before the court.

There must be decrees for an account, in the original suits, and dismissing the bills in the cross-suits with costs.

MICOU v. LAMAR.

(Circuit Court for New York: 7 Federal Reporter, 180-187. 1881.)

Opinion by CHOATE, J.

STATEMENT OF FACTS.—In this case the complainant having a decree for an accounting, the case comes up again upon exceptions to the master's report.

The first point raised by the defendant is that the master improperly charged the defendant, in the case of each of the infants, with the value of one-third of ten shares in the stock of the Mechanics' Bank of Augusta, in the state of

Georgia. The evidence is that these shares formerly belonged to W. W. Sims, the father of the infants, who died in 1850; and that, at the time of the appointment of defendant's testator as guardian, they stood on the books of the bank in the name of Mrs. Abercrombie, the widow of said W. W. Sims, as his administratrix. From February, 1856, to February, 1859, defendant's testator, as guardian of each of the infants, received from the bank one-third of the dividends on these ten shares, and thereafter, from the death of the mother, Mrs. Abercrombie, until the war, when the stock became worthless, he received from the bank, as guardian of each of the infants, one-half of said dividends. It appears by a memorandum in the guardian's account that in January, 1856, the guardian applied to the bank for a transfer to him, as guardian of the infants, of the two-thirds of the ten shares, but the bank, though willing to pay the dividends and continuing thereafter to do so, as above stated, refused to make a transfer of the stock itself. I think it is a proper inference from this evidence that the real beneficial interest in one-third of these ten shares was in each of the infants after the death of their father. The great lapse of time since his death, and the absence of any evidence that the property was needed for payment of his debts, warrant the conclusion that the guardian could, upon requesting it of Mrs. Abercrombie, the administratrix, have had the estate so far settled as to have procured a transfer of the infants' interest to him as guardian. It is argued that the guardian was under no obligation to reduce property of this kind belonging to his ward in another state to his possession; that the office of guardian is local, and as to property out of the state, under whose laws he holds his appointment, he is only chargeable with that of which he actually takes possession. I cannot subscribe to this doctrine. I think it is the duty of the guardian to take into his possession, so far as he is able, the estate of his ward, whoever it may be, and that he is not to be justified in abandoning any part of it because it happens to be outside of the jurisdiction of the state wherein he is appointed. It is objected, however, that the laws of Georgia interposed an obstacle to prevent the guardian from reducing this stock to possession and removing it from the state, or selling it and investing the proceeds as required by the law of New York. There was a short period, from the spring of 1859 to January, 1860, when the infants resided in Georgia with their relatives. After that they resided in Alabama, and before that, from shortly after the appointment of the guardian till the spring of 1859, when their mother, Mrs. Abercrombie, died, in Connecticut with their mother.

§ 821. *Circumstances under which a guardian is chargeable with property of his ward in another state which he has not withdrawn.*

It appears that by the law of Georgia a foreign guardian cannot remove property within the state belonging to his ward without the consent of the ordinary. The matter appears to be committed to the discretion of the ordinary. I cannot conceive of any reason why the ordinary should refuse his consent, unless it were during the brief period that the wards resided in that state. It does not appear that in this case the guardian ever applied for his consent. And the burden being upon the guardian to show that he could not get possession of the property and invest it as required by the terms of his appointment, I think the defendant has failed to sustain that burden or to show that there was any obstacle growing out of the laws of Georgia which prevented his getting possession of the stock and investing it properly. It is also claimed by defendant that he should be allowed a deduction from the value of this stock for the expense that would be necessarily incurred in re-

ducing it to possession. There is no proof what the expense would be, or that it would be more than nominal. It is not to be presumed that the mother of the wards would have interposed any difficulties, or that the guardian would have been charged with any expenses in obtaining a transfer of the stock. The defendant was therefore properly charged with this item.

The next question is whether the master properly charged the defendant, in the case of each infant, with one-sixth of the value of these same shares of stock, and with one-half of the value of nine shares of the stock of the Bank of Commerce, a Georgia corporation. These stocks belonged to Mrs. Abercrombie, the mother of the wards, in her life-time. One-third interest in the ten shares of the Mechanics' Bank came to her from her husband, W. W. Sims, and the ten shares stood in her name as his administratrix, as above stated. The nine shares were purchased by her, and stood in her name till her death, in the spring of 1859. On her death, her husband, Mr. Abercrombie, became entitled to her personal property. The title of each of the wards in one-half of their mother's interest in these two lots of stock is derived through what is claimed to have been a surrender by Mr. Abercrombie to her two children of their mother's interest in the same. The evidence that such a surrender or transfer was made is chiefly a letter of the guardian to the grandmother of the two children, dated May 23, 1859,—soon after the death of Mrs. Abercrombie, their mother,—and the acts of the parties in apparent conformity with what the letter shows had been done by Mr. Abercrombie in respect to such a surrender. In this letter defendant's testator says:

"You were informed through Mary Jane that Rev. Mr. Abercrombie had offered to surrender the property he acquired through Mrs. Sims, and which had belonged to her former husband, to the two children. Subsequently he made a transfer, to take effect *at his death*, and two notes, one to each of the girls, payable six months after his death, for \$2,750 each. Again he changed his mind and offered to make a surrender at once, and gave me deeds to two three-story houses in Brooklyn, E. D., seventeen feet only, and subject to \$4,500 mortgage on each, with last year's taxes and some arrears for repairs, and only one house tenanted, at \$550 rent. After inspecting the houses and taking the opinion of a judicious friend, which confirmed my own, I thought it best to decline the proposition in that shape and hold on to the notes, \$2,750 each, though unsecured, because the incumbrances on the property might entail more outlay than income for the children. This morning I have a letter from him without any further proposition, which I hoped he would have made; so that I retain the two notes and a transfer of all his interest derived through his wife to the balance of the estate. This will include her one-third part of the ten shares Mechanics' Bank stock, and nine shares of the Bank of Commerce, and her third of the notes received for the Florida land. I hope the children are improving, etc. . . . Their income is limited, without the notes of Rev. Mr. A. and those for the land, to between \$500 and \$600 each, so long as the banks continue to pay regular dividends as they have done."

From the date of that letter defendant's testator charged himself in his accounts as guardian with the receipt of the dividends on the said one-third of the ten shares Mechanics' Bank, and on the nine shares Bank of Commerce, one-half in the account with each of the wards. Among the assets and papers transferred by the defendant's testator to Mr. Micou, upon the appointment of the latter as guardian in 1867, as appears by the receipt of Mr. Micou given therefor, are the following:

"The conveyance of Richard M. Abercrombie, dated 10th of May, 1859, of all he then had or might have in the estate of W. W. Sims, in right of his late wife, then deceased;" "two notes, each for \$2,750, dated April 15, 1859, of the said Rev. Richard M. Abercrombie, payable six months after his decease, without interest;" "No. 136, Bank of Commerce certificate for nine shares stock for Mrs. M. C. Abercrombie, 8th July, 1857."

I think it is a fair inference from the letter, the recitals of Mr. Micou's receipt, and the continued collection of the dividends by the guardian, that Mr. Abercrombie made an immediate surrender to the guardian of his wife's interest in the ten shares of the Mechanics' Bank stock, and the nine shares Bank of Commerce stock. Without these other circumstances the letter might have been taken to import that his surrender of these stocks was to take effect only at his death; but in the light of these circumstances, which strongly tend to show that a present surrender, at least of these two pieces of property, was made, I think the conclusion of the master was correct that defendant's testator could, by proper effort on his part, have reduced these stocks to his possession. It is true that to do so, and to vest the legal title in the guardian, it would have been necessary for some one to have taken out letters of administration on the estate of W. W. Sims, and also on the estate of Mrs. Abercrombie; but it is not to be presumed, in the absence of evidence, that this could not have been done. Nor do the circumstances tend to show that this property was needed to pay the debts of Mrs. Abercrombie. Such a supposition is inconsistent with the terms of the letter of Mr. Lamar. It appeared that Mr. Abercrombie is living, and he was not called as a witness. There was at least *prima facie* evidence that the guardian had under his control, and so within his reach that he could have reduced them to possession, these two lots of stock, formerly belonging to the mother of his wards, and his failure to call Mr. Abercrombie to show that the surrender of them was not immediate, if that was the fact, does not aid his case. The same suggestions relative to the expense of obtaining possession of these stocks, and relative to any difficulty growing out of the laws of Georgia, apply to these items as to the interest of each of the wards in the one-third of the ten shares Mechanics' Bank derived from her father.

§ 822. *Liability of guardian for railroad bonds and coupons. Rule for estimating value of the latter.*

The next question raised is whether the defendant's testator should receive any credit for past-due coupons on one bond of the East Tennessee, Virginia & Georgia Railroad, and three bonds of the city of Memphis, which were among the securities turned over to Mr. Micou, the new guardian. It is insisted by the plaintiff that there is no evidence that at the time they were so transferred they had any value. It appears that about two years thereafter they became collectible. I think, however, there is evidence that they had value at the time of the transfer, and this is the agreed fact, that the bonds to which they belonged were then worth a certain per cent. of their face. In the absence of any evidence affecting the validity of these over-due coupons, I think it may safely be assumed they were worth at least an equal percentage on their face value. It is to be presumed that they have the same security for their payment as the principal of the bond, with the added advantage of being already due,—a circumstance which attaches to the possession of them remedies which the bonds themselves may not have carried with them. I think,

therefore, the defendant's claim for this credit is reasonable, and should be allowed.

I see no reason whatever for allowing a credit for the securities turned over to the new guardian at the highest rate at which they could at any time afterwards have been sold, and the exception on the ground that such an allowance was not made must be overruled.

§ 823. *Rule as to commissions of guardian.*

The circumstances of this case are not such that the guardian should be refused his commissions. If he accounts fully for all the estate of his ward, the plaintiff gets a full indemnity, though the commissions are allowed. There was no wilful misconduct on the part of the guardian. *King v. Talbot*, 40 N. Y., 96.

§ 824. *Rule as to rate of interest with which guardian is chargeable.*

The remaining questions submitted relate to the rate of interest and the mode of computing it. This matter was somewhat considered upon the settlement of the interlocutory decree, and the master was directed to compute interest at the rate of five per cent., with annual rests, the rate being fixed at the uniform rate of one per cent. less than the present legal rate of interest in this state. I think, however, there is good reason to discriminate as to the rate of interest between the period of the guardianship and the period subsequent thereto. The guardianship of one of the infants terminated in 1864, on her death; that of the other in 1872, on her attaining her majority. In both cases the guardianship terminated long before the legal rate of interest in this state was reduced from seven per cent. to six per cent. The rate of interest with which a trustee should be charged during the period of the trust, under similar circumstances, was very carefully considered by the court of appeals in the case of *Talbot v. King*, *ut supra*, and it was fixed at six per cent., or one per cent. below the legal rate of interest in this state. If that decision is not binding on this court, it is entitled to very great consideration, and should, I think, be followed; and the change made in the legal rate, so long after the termination of these guardianships, does not affect the question of the rate during the period of the guardianship. During the guardianship the account is to be taken with annual rests. But, with respect to the period subsequent to the termination of the trust, a different principle applies. The wards having rejected the investments made by the guardian and demanded the equivalent in money of what would have been a proper investment, the rate of interest with which he is to be charged during the period of the guardianship is that which, with proper and safe investments, he might have realized, and therefore less than the current legal rate, as explained in the case of *Talbot v. King*, above referred to. From the termination of the guardianship, however, in the position assumed by the wards of rejecting the investments, the liability of the guardian was simply to pay over a certain sum of money. His duty was, not to invest it, or to keep it invested, but to pay it to the wards or their legal representatives on demand. It was due presently, and, like other sums due presently, carries interest without annual rests at the rate fixed by law therefor. The guardian could have relieved himself at any time by payment. The wards could have had their money at any time on demand. As to this period, therefore, there is no reason for computing the account with annual rests, nor for charging a less rate than the legal rate of interest, which was seven per cent. down to January 1, 1880, and six per cent. from that date to the present time.

Other questions, which might have been raised upon the exceptions as drawn, have not been presented on the argument, and, as I understand it, are not now insisted upon.

Let a decree be entered in conformity with this opinion.

§ 825. Guardianship — Nature of appointment and removal.— What does not in Pennsylvania constitute a man a general guardian. *Linton v. First Nat. Bank*, 10 Fed. R., 897.

§ 826. Under the act of 1850, guardians may be appointed for non-resident minors "after notice," etc. An appointment without any notice is void. *Seaverns v. Gerke*, 3 Saw., 353.

§ 827. Where the appointment of a guardian is void for want of jurisdiction of the court, all proceedings of such guardian, including a sale of lands, are void also. *Ibid.*

§ 828. A Rhode Island court of probate cannot put a person under guardianship, as unfit to manage her affairs, without notice to the party and an adjudication on the facts. *Smith v. Burlingame*, 4 Mason, 121.

§ 829. The oral motion for appointing a guardian to a minor is not permissible. *Rhineland v. Sanford*,* 3 Day, 279.

§ 830. That a guardian continues until the infant arrives at full age, see *Smoot v. Bell*, 8 Cr. C. C., 343.

§ 831. Guardians, their rights and duties.—The rights and power of guardians are strictly local. *Powers v. Mortee*,* 4 Am. L. Reg., 427.

§ 832. A guardian appointed in one county is competent to receive the purchase money for land lying in another county. *Brooke v. Potowmack Company*, 1 Cr. C. C., 526.

§ 833. The guardian of an infant may sell his ward's interest in a patent right; nor does such sale under Massachusetts law necessitate a license from the probate court. *Wallace v. Holmes*,* 5 Fisher, 37; S. C., 9 Blatch., 69.

§ 834. The negligence of a guardian, however gross, does not estop a ward from asserting his rights. *Telegraph Co. v. Davenport*, 7 Otto, 869 (CORP., §§ 489-90).

§ 835. Where persons claim adversely as guardians, having no distinct interest of their own, and the question is, who is legally entitled to be guardian, the value of the minor's estate affords no basis of value for an appeal. The office of guardian is of no value, except so far as it affords a compensation for labor and services to be earned. *Ritchie v. Mauro*, 2 Pet., 248.

§ 836. Case of judgment against infant heirs and a writ of *elegit*, followed in five years by ejectment. Question of profits considered, and the power of the guardian to bind the land with the consent of the *elegit* creditors. The heirs occupying for five years, this was treated as an occupation under an implied contract which the guardian had a right to make for them, and his perception of profits as a perception by them. *Ronald v. Barkley*, 1 Marsh., 356.

§ 837. Sale of ward's land.—Sale of land under Oregon code must be made at public auction, on due notice of time and place. *Hobart v. Upton*,* 2 Saw., 302.

§ 838. Construction of Nebraska statute concerning sale by the guardian of his ward's lands. *Semble*, that want of service of the application to sell, was not a proper objection under the circumstances. But even if it were, possession having been taken under the sale, and more than five years elapsing after the minor attained his majority before the validity of the sale was impeached, the purchaser is protected by the limitation bar of the statute. *Miller v. Sullivan*,* 4 Dill., 340.

§ 839. Where a partition deed is made by tenants in common, and one of the tenants is under guardianship, the deed, when executed by guardian, passes the title of the ward and is good until avoided by the ward. *Thomas v. Hatch*, 3 Sumn., 170.

§ 840. Account of guardian and ward.—Under the law of Pennsylvania the orphans' court has full jurisdiction of the accounts of guardians, and its judgments are conclusive. *Blount v. Darrach*, 4 Wash., 637.

§ 841. A ward's right of priority under the Virginia statute in his deceased guardian's estate. *Black v. Scott*, 2 Marsh., 238.

§ 842. Cessation of relation — Suits on bond, etc.—Executors are not entitled to sue the guardian of the testator's children for money which comes into his hands for the education and maintenance of the children, even after the cessation of the relation of guardian, unless the step is rendered necessary by the condition of the estate for the payment of debts. *Gaines v. Spann*, 2 Marsh., 81.

§ 843. A guardian whose authority is revoked is bound by his bond to pay over the money in his hands to the person appointed to receive it; and the order is not void because the new appointee had not yet given his bond. *United States v. Nicholls*, 4 Cr. C. C., 290.

§ 844. Duties and obligations of a guardian, irrespective of his bond. How he can be relieved from these objections. *Van Epps v. Walsh*, 1 Woods, 593.

§ 845. Procedure considered in an action upon a guardian's bond for not delivering up the property of the ward as ordered by the orphans' court. A guardian appointed in Washington county is liable upon his bond for money received by him in Maryland for his ward's use. *United States v. Nicholls*, 4 Cr. C. C., 191. And see *id.*, 4 Cr. C. C., 290.

§ 846. If the characters of executor and of receiving guardian be united in the same person, the guardian who charges himself discharges himself as executor. *Alston v. Munford*, 1 Marsh., 266.

§ 847. Where the executor of the father's estate, who is also testamentary guardian of the daughter, receives the bond given as a specific legacy to the daughter, and charges himself in his executor's account with the amount thereof "to be paid to his ward," and writes to the obligor in the bond that he shall make himself debtor to his ward for the legacy, and hold the obligor bound to himself, this is a sufficient transfer to the guardian from the executor to transfer the official liabilities accordingly. *Ibid.*

§ 848. Where an administratrix, after a probate decree of distribution, takes out guardianship of one of those entitled to a share who is a minor, she retains the share as guardian and not as administratrix, and as to sureties on her two official bonds the right to sue lies accordingly. *Taylor v. Deblois*,* 4 Mason, 181.

§ 849. Where an administrator, who is at the same time a guardian, receives assets in the former capacity, he is deemed to hold them as such until he elects to retain them as guardian. *Pratt v. Northam*, 5 Mason, 95.

§ 850. Miscellaneous points.—A guardian in Washington county is liable for money received for land sold in Maryland. *United States v. Bender*,* 5 Cr. C. C., 620.

§ 851. A guardian is liable for a note received by him for a debt due to his ward. *Ibid.* See, also, *INFANCY*, *post*, IV.

IV. INFANCY.

SUMMARY—*Infants' contracts void, voidable or binding*, §§ 852-859.—*Service in suits against infants*, §§ 860, 861.—*Plea of infancy a personal privilege*, § 862.—*Torts of an infant*, §§ 863, 864.

§ 852. Contracts of an infant may be void, voidable or binding. An infant may avoid his acts, deeds or contracts in different ways. What constitutes disaffirmance or confirmation stated. *Tucker v. Moreland*, §§ 865-75.

§ 853. Where an infant deeds land to A., but remains in possession, he may disaffirm his conveyance by deeding it to B. upon reaching majority without putting A. *in statu quo*. And although disaffirmance would be a fraud upon the other party, it is permissible in such cases. *Ibid.*

§ 854. The deed of an infant is not absolutely void, but only voidable at his election upon reaching majority; and where by such deed the infant does only what the law would compel him to do, it is not even voidable. *Irvine v. Irvine*, §§ 876-83.

§ 855. Ratification of a deed by an infant need not be of as solemn a character as the deed itself. Mere acquiescence will not generally suffice, but a clear and unequivocal ratification, showing a clear intention to affirm, ought to be sufficient. The facts showing ratification should be left to the jury. *Ibid.*

§ 856. An infant may be a trustee and be compelled to execute the trust; and if, after reaching majority, he affirm and ratify the trust and the acts done under it, he cannot deny that the trust existed. *Ibid.* And see § 205.

§ 857. In Indiana, the deed of a *feme covert*, who is also an infant, is not void, but voidable; her husband joining in the conveyance. She need not disaffirm within a reasonable time after attaining majority, if still *covert*, but may wait until coverture ends. *Sims v. Everhardt*, §§ 884-89.

§ 858. An estoppel *in pais* is not applicable to infants, and one's fraudulent representation of full age at the time of making the deed, while a minor, does not conclude such a party. *Ibid.*

§ 859. A promise made after full age to pay an acceptance given during the minority of the acceptor will bind him; but not a promise made after the commencement of the suit. *Hyer v. Hyatt*, §§ 890-91.

§ 860. Where a suit is brought to cancel an insurance contract a circuit court does not acquire jurisdiction of an infant defendant who neither appears nor has personal service of process upon him within the district. The appointment of a guardian *ad litem* in his absence will not suffice. *Insurance Company v. Bangs*, §§ 892-97. See § 707.

§ 861. United States courts are not authorized by the statutes of Michigan to dispense with proper personal service of process upon infants. *Ibid.*

§ 862. Infancy is a personal defense confined to the infant, and cannot be pleaded by an adult co-defendant. *Baldwin v. Rosier*, § 898.

§ 863. Infancy is a good bar to an action by the owner against his supercargo for breach of instructions, but not to an action of trover for the goods. Nevertheless, infancy may be given in evidence, not as a bar, but to show the nature of the act claimed to be a conversion. *Vasse v. Smith*, §§ 899-902.

§ 864. An infant is liable in trover, although the goods were delivered to him under a contract, and although they were not actually converted to his own use. *Ibid*.

[NOTES.— See §§ 903-936.]

TUCKER v. MORELAND.

(10 Peters, 58-79. 1836.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.— This is a writ of error to the circuit court for the county of Washington and District of Columbia.

The original action was an ejectment brought by the plaintiff in error against the defendant in error; and both parties claimed the title under Richard N. Barry. At the trial of the cause upon the general issue, it was admitted that Richard N. Barry, being seized in fee of the premises sued for, on the 1st day of December, 1831, executed a deed thereof to Richard Wallach. The deed, after reciting that Barry and one Bing were indebted to Tucker and Thompson in the sum of \$3,238, for which they had given their promissory note, payable in six months after date, to secure which the conveyance was to be made, conveyed the premises to Wallach, in trust, to sell the same in case the debt should remain unpaid ten days after the 1st day of December then next. The same were accordingly sold by Wallach, for default of payment of the note, on the 23d of February, 1833, and were bought at the sale by Tucker and Thompson, who received a deed of the same on the 7th of March of the same year. It was admitted that, after the execution of the deed of Barry to Wallach, the former continued in possession of the premises until the 8th of February, 1833, when he executed a deed, including the same and other parcels of land, to his mother, Eliza G. Moreland, the defendant, in consideration (as recited in the deed) of the sum of \$1,138.61, which he owed his mother, for the recovery of which she had instituted a suit against him, and of other sums advanced him, a particular account of which had not been kept, and of the further sum of \$5. At the time of the sale of Wallach the defendant gave public notice of her title to the premises, and she publicly claimed the same as her absolute right. The defendant further gave evidence at the trial to prove that, at the time of the execution of the deed by Barry to Wallach, he, Barry, was an infant under twenty-one years of age, and at the time of the execution of the deed to the defendant he was of the full age of twenty-one years.

Upon this state of the evidence the counsel for the defendant prayed the court to instruct the jury that if, upon the whole evidence given as aforesaid to the jury, they should believe the facts to be as stated as aforesaid, then the deed from the said Wallach to the plaintiffs did not convey to the plaintiffs any title which would enable them to sustain the action. This instruction the court gave; and this constitutes the exception now relied on by the plaintiff in error in his first bill of exceptions.

Some criticism has been made upon the language in which this instruction is couched. But, in substance, it raises the question which has been so fully argued at the bar as to the validity of the plaintiffs' title to recover, if Barry

was an infant at the time of the execution of his deed to Wallach. If that deed was originally void by reason of Barry's infancy, then the plaintiff, who must recover upon the strength of his own title, fails in that title. If, on the other hand, that deed was voidable only and not void, and yet it has been avoided by the subsequent conveyance to the defendant by Barry, then the same conclusion follows. And these accordingly are the considerations which are presented under the present instruction.

§ 865. *Contracts of infants are void, voidable or binding. Illustrations.*

In regard to the point whether the deed of lands by an infant is void or voidable at the common law, no inconsiderable diversity of opinion is to be found in the authorities. That some deeds or instruments under seal of an infant are void, and others voidable, and others valid and absolutely obligatory, is not doubted. Thus, a single bill under seal given by an infant for necessities is absolutely binding upon him; a bond with a penalty for necessities is void as apparently to his prejudice; and a lease reserving rent is voidable only. See *Russell v. Lee*, 1 Lev., 86; *Fisher v. Mowbray*, 8 East, 330; *Baylis v. Dineley*, 3 M. & S., 470; Co. Litt., 172, a. The difficulty is in ascertaining the true principle upon which these distinctions depend. Lord Mansfield, in *Zouch v. Parsons*, 3 Burr., 1804, said that it was not settled what is the true ground upon which an infant's deed is voidable only; whether the solemnity of the instrument is sufficient, or it depends upon the semblance of benefit from the matter of the deed upon the face of it. Lord Mansfield, upon a full examination of the authorities on this occasion, came to the conclusion (in which the other judges of the court of king's bench concurred) that it was the solemnity of the instrument and delivery by the infant himself, and not the semblance of benefit to him, that constituted the true line of distinction between void and voidable deeds of the infant, but he admitted that there were respectable sayings the other way. The point was held by the court not necessary to the determination of that case, because in that case the circumstances showed that there was a semblance of benefit sufficient to make the deed voidable only upon the matter of the conveyance. There can be little doubt that the decision in *Zouch v. Parsons* was perfectly correct, for it was the case of an infant mortgagee releasing by a lease and release his title to the premises, upon the payment of the mortgage money by a second mortgagee, with the consent of the mortgagor. It was precisely such an act as the infant was bound to do, and would have been compelled to do, by a court of equity, as a trustee of the mortgagor. And certainly it was for his interest to do what a court of equity would, by a suit, have compelled him to do. See ——— *v. Handcock*, 17 Ves., 383; 1 Fonbl. Eq., B. 1, c. 2, § 5, and notes; Co. Litt., 172, a; Com. Dig., Infant, B. 5.

Upon this occasion Lord Mansfield and the court approved the law as laid down by Perkins (§ 12), that "all such gifts, grants or deeds made by infants, which do not take effect by delivery of his hand, are void. But all gifts, grants or deeds made by infants by matter of deed or in writing, which do take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate." And in Lord Mansfield's view, the words, "which do take effect," are an essential part of the definition, and exclude letters of attorney or deeds which delegate a mere power and convey no interest. See *Saunders v. Mann*, 1 H. Black., 75. So that, according to Lord Mansfield's opinion, there is no difference between a feoffment and any deeds which convey an interest. In each case, if the infant makes no feoffment, or delivers no deed

in person, it takes effect by such delivery of his hand, and is voidable only. But if either be done by a letter of attorney from the infant, it is void, for it does not take effect by a delivery of his hand.

There are other authorities, however, which are at variance with this doctrine of Lord Mansfield, and which put a different interpretation upon the language of Perkins. According to the latter, the semblance of benefit to the infant or not is the true ground of holding his deed voidable or void. That it makes no difference whether the deed be delivered by his own hand or not; but whether it be for his benefit or not. If the former, then it is voidable; if the latter, then it is void. And that Perkins, in the passage above stated, in speaking of gifts and grants taking effect by the delivery of the infant's hand, did not refer to the delivery of the deed, but to the delivery of the thing granted; as, for instance, in the case of a feoffment, to a delivery of seizin by the infant personally; and in case of chattels, by a delivery of the same by his own hand. This is the sense in which the doctrine of Perkins is laid down in Sheppard's Touchstone, 232. Of this latter opinion, also, are some other highly respectable text writers (see Preston on Conveyancing, 248, 250; Com. Dig., Infant, ch. 2; Shep. Touch., 232, and Acherly's note; Bac. Abridg., Infancy, I. 3; English Law Journal for 1804, p. 145; 8 Amer. Jurist, 327. But see 1 Powell on Mortg. by Coventry, note to p. 208; Zouch v. Parsons, 1 W. Black., 575; Ellsley's notes, (*h*) and (*v*); Co. Litt., 51; 6 Harg., note 331; Holmes v. Blogg, 8 Taunt., 508; 1 Fonbl. Eq., b. 1, ch. 11, § 3, and notes (*y*) (*a*) (*b*); and, perhaps, the weight of authority, antecedent to the decision in Zouch v. Parsons, 3 Burr., 1804, inclined in the same way. Lord Chief Justice Eyre, in Keane v. Boycott, 2 Hen. Black., 515, alluded to this distinction in the following terms. After having corrected the generality of some expressions in Litt., § 259, he added: "We have seen that some contracts of infants, even by deed, shall bind them; some are merely void, namely, such as the court can pronounce to be to their prejudice; others, and the most numerous class, of a more uncertain nature as to benefit or prejudice, are voidable only; and it is in the election of the infant to affirm them or not. In Roll. Abridg., title Enfants (1 Roll. Abridg., 728), and in Com. Dig., under the same title, instances are put of the three different kinds, of good, void and voidable contracts. Where the contract is by deed, and not apparently to the prejudice of the infant, Comyns states it as a rule that the infant cannot plead *non est factum*, but must plead his infancy. It is his deed; but this is a mode of disaffirming it. He, indeed, states the rule generally; but I limit it to that case, in order to reconcile the doctrine of void and voidable contracts." A doctrine of the same sort was held by the court in Thompson v. Leach, 3 Mod., 310; in Fisher v. Mowbray, 8 East, 330, and Baylis v. Dineley, 3 Maule & Sel., 477. In the last two cases, the court held that an infant cannot bind himself in a bond with a penalty, and especially to pay interest. In the case of Baylis v. Dineley, Lord Ellenborough said: "In the case of the infant lessor, that being a lease, rendering rent, imported on the face of it a benefit to the infant; and his accepting the rent at full age was conclusive that it was for his benefit. But how do these authorities affect a case like the present, where it is clear upon the face of the instrument that it is to the prejudice of the infant, for it is an obligation with a penalty, and for the payment of interest? Is there any authority to show that if, upon looking to the instrument, the court can clearly pronounce that it is to the infant's prejudice, they will, nevertheless,

suffer it to be set up by matter *ex post facto* after full age?" And then, after commenting on *Keane v. Boycott*, and *Fisher v. Mowbray*, he added: "In *Zouch v. Parsons*, where this subject was much considered, I find nothing which tends to show that an infant may bind himself to his prejudice. It is the privilege of the infant that he shall not; and we should be breaking down the protection which the law has cast around him, if we were to give effect to a confirmation by parol of a deed, like this, made during his infancy."

It is apparent then, upon the English authorities, that however true it may be that an infant may so far bind himself by deed in certain cases, as that in consequence of the solemnity of the instrument it is voidable only, and not void; yet that the instrument, however solemn, is held to be void, if upon its face it is apparent that it is to the prejudice of the infant. This distinction, if admitted, would go far to reconcile all the cases; for it would decide that a deed by virtue of its solemnity should be voidable only, unless it appeared on its face to be to his prejudice, in which case it would be void. See *Bac. Ab., Infancy and Age*, I. 3, I. 7.

§ 866. — *American decisions.*

The same question has undergone no inconsiderable discussion in the American courts. In *Oliver v. Houdlet*, 13 Mass., 239, the court seemed to think the true rule to be, that those acts of an infant are void which not only apparently, but necessarily, operate to his prejudice. In *Whitney v. Dutch*, 14 Mass., 462, the same court said that, whenever the act done may be for the benefit of the infant, it shall not be considered void; but that he shall have his election, when he comes of age, to affirm or avoid it. And they added, that this was the only clear and definite proposition which can be extracted from the authorities. See *Boston Bank v. Chamberlain*, 15 Mass., 220. In *Conroe v. Birdsall*, 1 Johns. Cas., 127, the court approved of the doctrine of *Perkins*, § 12, as it was interpreted and adopted in *Zouch v. Parsons*; and in the late case of *Roof v. Stafford*, 7 Cowen, 180, 181, the same doctrine was fully recognized. But in an intermediate case (*Jackson v. Burchin*, 14 Johns., 126), the court doubted whether a bargain and sale of lands by an infant was a valid deed to pass the land, as it would make him stand seized to the use of another. And that doubt was well warranted by what is laid down in 2 Inst., 673, where it is said that if an infant bargain and sell lands which are in the realty, by deed indented and enrolled, he may avoid it when he will, for the deed was of no effect to raise a use.

The result of the American decisions has been correctly stated by Mr. Chancellor Kent, in his learned Commentaries (2 Com., Lect. 31), to be, that they are in favor of construing the acts and contracts of infants generally to be voidable only, and not void, and subject to their election, when they become of age, either to affirm or disallow them, and that the doctrine of *Zouch v. Parsons* has been recognized and adopted as law. It may be added that they seem generally to hold that the deed of an infant conveying lands is voidable only, and not void; unless, perhaps, the deed should manifestly appear on the face of it to be to the prejudice of the infant, and this upon the nature and solemnity as well as the operation of the instrument.

It is not, however, necessary for us in this case to decide whether the present deed, either from its being a deed of bargain and sale, or from its nature, as creating a trust for a sale of the estate, or from the other circumstances of the case, is to be deemed void, or voidable only. For if it be voidable only, and

has been avoided by the infant, then the same result will follow, that the plaintiff's title is gone.

§ 867. *An infant may avoid his acts, deeds or contracts in different ways.*

Let us, then, proceed to the consideration of the other point, whether, supposing the deed to Wallach to be voidable only, it has been avoided by the subsequent deed of Barry to Mrs. Moreland. There is no doubt that an infant may avoid his act, deed or contract by different means, according to the nature of the act and the circumstances of the case. He may sometimes avoid it by matter *in pais*, as in case of a feoffment by an entry, if his entry is not tolled; sometimes by plea, as when he is sued upon his bond or other contract; sometimes by suit, as when he disaffirms a contract made for the sale of his chattels and sues for the chattels; sometimes by a writ of error, as when he has levied a fine during his nonage; sometimes by a writ of *audita querela*, as when he has acknowledged a recognizance or statute staple or merchant (see Com. Dig., *Enfant*, B. 1, 2, C. 2, 3, 4, 5, 8, 9, 11; 2 Inst., 673; 2 Kent's Comm., § 31; Bac. Abr., *Infancy and Age*, I. 5, I. 7); sometimes, as in the case of an alienation of his estate during his nonage by a writ of entry, *dum suit infra ætatem*, after his arrival of age.

§ 868. — *whether the act of disaffirmance must be of as high and solemn a nature as the act disaffirmed.*

The general result seems to be that where the act of the infant is by matter of record, he must avoid it by some act of record (as, for instance, by a writ of error or an *audita querela*) during his minority. But if the act of the infant is a matter *in pais* it may be avoided by an act *in pais* of equal solemnity or notoriety, and this, according to some authorities, either during his nonage or afterwards; and according to others, at all events, after his arrival of age. See Bac. Abr., *Infancy and Age*, I. 3, I. 5, I. 7; Zouch v. Parsons, 3 Burr., 1794; Hoof v. Stafford, 7 Cow., 179, 183; Com. Dig., *Enfant*, C. 9, C. 4, C. 11. In Co. Litt., 380, b, it is said: "Herein a diversity is to be observed between matters of record done or suffered by an infant, and matters *in fait*, for matters *in fait* he shall avoid either within age or at full age, as hath been said; but matters of record, as statutes merchants, and of the staple recognizances acknowledged by him, or a fine levied by him, recovery against him, etc., must be avoided by him, namely, statutes, etc., by *audita querela*; and the fine and recovery by a writ of error during his minority, and the like." In short, the nature of the original act or conveyance generally governs as to the nature of the act required to be done in the disaffirmance of it. If the latter be of as high and solemn a nature as the former, it amounts to a valid avoidance of it. We do not mean to say that in all cases the act of disaffirmance should be of the same or of as high and solemn a nature as the original act, for a deed may be avoided by a plea. But we mean only to say that if the act of disaffirmance be of as high and solemn a nature, there is no ground to impeach its sufficiency. Lord Ellenborough, in Baylis v. Dineley, 3 Maule & Sel., 481, 482, held a parol confirmation of a bond given by an infant after he came of age to be invalid, insisting that it should be by something amounting to an estoppel in law, of as high authority as the deed itself, but that the same deed might be avoided by the plea of infancy. There are cases, however, in which a confirmation may be good without being by deed, as in case of a lease by an infant, and his receiving rent after he came of age. See Bac. Abr., *Infancy and Age*, I. 8.

§ 869. *Where an infant deeds land to A., but remains in possession, he may disaffirm his conveyance by deeding it to B. upon reaching his majority, without putting A. in statu quo.*

The question then is whether, in the present case, the deed to Mrs. Moreland, being of as high and solemn a nature as the original deed to Wallach, is not a valid disaffirmance of it. We think it is. If it was a voidable conveyance which had passed the seizin and possession to Wallach, and he had remained in possession, it might, like a feoffment, have been avoided by an entry by an infant after he came of age. See *Inhabitants of Worcester v. Eaton*, 13 Mass., 375; *Whitney v. Dutch*, 14 Mass., 462. But in point of fact Barry remained in possession; and therefore he could not enter upon himself. And when he conveyed to Mrs. Moreland, being in possession, he must be deemed to assert his original interest in the land, and to pass it in the same manner as if he had entered upon the land and delivered the deed thereon, if the same had been in an adverse possession.

The cases of *Jackson v. Carpenter*, 11 Johns., 593, and *Jackson v. Burchin*, 14 Johns., 124, are directly in point, and proceed upon principles which are in perfect coincidence with the common law, and are entirely satisfactory. Indeed, they go further than the circumstances of the present case require; for they dispense with an entry where the possession was out of the party when he made the second deed. In *Jackson v. Burchin* the court said that it would seem not only upon principle, but authority, that the infant can manifest his dissent in the same way and manner by which he first assented to convey. If he has given livery of seizin, he must do an act of equal notoriety to disaffirm the first act; he must enter on the land and make known his dissent. If he has conveyed by bargain and sale, then a second deed of bargain and sale will be equally solemn and notorious in disaffirmance of the first. See the same point, 2 Kent's Comm., § 31. We know of no authority or principle which contradicts this doctrine. It seems founded in good sense, and follows out the principle of notoriety of disaffirmance in the case of a feoffment by an entry; that is, by an act of equal notoriety and solemnity with the original act. The case of *Frost v. Wolveston*, 1 Strange, 94, seems to have proceeded on this principle.

Upon these grounds we are of opinion that the deed of Barry to Mrs. Moreland was a complete disaffirmance and avoidance of his prior deed to Wallach; and consequently, the instruction given by the circuit court was unexceptionable. To give effect to such disaffirmance, it was not necessary that the infant should first place the other party *in statu quo*.

The second bill of exceptions, taken by the plaintiff, turns upon the instructions asked upon the evidence stated therein, and scarcely admits of abbreviation. It is as follows:

"The plaintiff, further to maintain and prove the issue on his side, then gave in evidence, by competent witnesses, facts tending to prove that the said Richard N. Barry had attained the full age of twenty-one years on the 14th day of September, 1831; and that, in the month of November, 1831, the said defendant, who was the mother of the said Richard, did assert and declare that said Richard was born on the 14th day of September, 1810; and that she did assert to Dr. McWilliams, a competent and credible witness, who deposed to said facts, and who was the *accoucheur* attending on her at the period of the birth of her said son, that such birth actually occurred on the said 14th

of September, 1810, and applied to said Dr. McWilliams to give a certificate and deposition that the said day was the true date of the birth; and thereupon the counsel for the plaintiff requested the court to instruct the jury:

"1. That, if the said jury shall believe, from the said evidence, that the said Richard N. Barry was of full age, and above the age of twenty-one years, at the time of the execution of said deed to said Wallach, or if the defendant shall have failed to satisfy the jury from the evidence that said Barry was, at the said date, an infant under twenty-one years, that then the plaintiff is entitled to recover.

"2. Or if the jury shall believe, from the said evidence, that if said Richard was under age at the time of the execution of said deed, that he did, after his arrival at age, voluntarily and deliberately recognize the same as an actual conveyance of his right, or during a period of several months acquiesce in the same without objection, that then the said deed cannot now be impeached on account of the minority of the grantor.

"3. That the said deed from the said Richard N. Barry to the defendant, being made to her with full notice of said previous deed to said Wallach, and including other and valuable property, is not so inconsistent with said first deed as to amount to a disaffirmance of the same.

"4. That, from the relative position of the parties to said deed to defendant, at and previous to its execution, and from the circumstances attending it, the jury may infer that the same was fraudulent and void.

"5. That, if the lessors of plaintiff were induced, by the acts and declarations of said defendant, to give a full consideration for said deed to Wallach, and to accept said deed as a full and only security for the debt *bona fide* due to them, and property *bona fide* advanced by them, and to believe that the said security was valid and effective, that then it is not competent for said defendant in this action to question or deny the title of said plaintiff under said deed, whether the said acts and declarations were made fraudulently, and for the purpose of practicing deception, or whether said defendant, from any cause, wilfully misrepresented the truth.

"Whereupon the court gave the first of the said instructions so prayed as aforesaid, and refused to give the others.

"To which refusal the counsel for the plaintiff excepted."

§ 870. *Acts on reaching full age which fall short of confirming a conveyance made during infancy.*

The first instruction, being given by the court, is, of course, excluded from our consideration on the present writ of error. The second instruction is objectionable on several accounts. In the first place it assumes, as matter of law, that a voluntary and deliberate recognition by a person after his arrival at age, of an actual conveyance of his right during his nonage, amounts to a confirmation of such conveyance. In the next place, that a mere acquiescence in the same conveyance, without objection, for several months after his arrival at age, is also a confirmation of it. In our judgment neither proposition is maintainable. The mere recognition of the fact that a conveyance has been made is not *per se* proof of a confirmation of it. Lord Ellenborough, in *Baylis v. Dineley*, 3 Maule & Sel., 482, was of opinion that an act of as high a solemnity as the original act was necessary to a confirmation. "We cannot," said he, "surrender the interests of the infant into such hands as he may chance to get. It appears to me that we should be doing so in this case (that

of a deed), unless we required the act after full age to be of as great a solemnity as the original instrument."

§ 871. *The acts of confirmation should be of such a solemn and unequivocal nature as to establish an intention to confirm the deed after full knowledge of its voidability.*

Without undertaking to apply this doctrine to its full extent, and admitting that acts *in pais* may amount to a confirmation of a deed, still we are of opinion that these acts should be of such a solemn and unequivocal nature as to establish a clear intention to confirm the deed, after a full knowledge that it was voidable. See *Boston Bank v. Chamberlin*, 15 Mass., 220. *A fortiori*, mere acquiescence, uncoupled with any acts demonstrative of an intent to confirm it, would be insufficient for the purpose. In *Jackson v. Carpenter*, 11 Johns., 542, 543, the court held that an acquiescence by the grantor in a conveyance made during his infancy, for eleven years after he came of age, did not amount to a confirmation of that conveyance; that some positive act was necessary evincing his assent to the conveyance. In *Curtin v. Patton*, 11 Serg. & R., 311, the court held that, to constitute a confirmation of a conveyance or contract by an infant, after he arrives of age, there must be some distinct act by which he either receives a benefit from the contract after he arrives at age, or does some act of express ratification. There is much good sense in these decisions, and they are indispensable to a just support of the rights of infants according to the common law. Besides, in the present case, as Barry was in possession of the premises during the whole period until the execution of his deed to Mrs. Moreland, there was no evidence to justify the jury in drawing any inference of any intentional acquiescence in the validity of the deed to Wallach.

§ 872. *A deed made after coming of age held a disaffirmance of one made during infancy.*

The third instruction is, for the reasons already stated, unmaintainable. The deed to Mrs. Moreland contains a conveyance of the very land in controversy, with a warranty of the title against all persons claiming under him (Barry), and a covenant that he had good right and title to convey the same, and, therefore, is a positive disaffirmance of the former deed.

§ 873. *A fraudulent deed is binding between the parties thereto.*

The fourth instruction proceeds upon the supposition that, if the deed to Mrs. Moreland was fraudulent between the parties to it, it was utterly void, and not merely voidable. But it is clear that, between the parties, it would be binding and available; however, as to the persons whom it was intended to defraud, it might be voidable. Even if it was made for the very purpose of defeating the conveyance to Wallach, and was a mere contrivance for this purpose, it was still an act competent to be done by Barry, and amounted to a disaffirmance of the conveyance to Wallach.

§ 874. *A deed made during infancy may be disaffirmed, even though the disaffirmance would be fraudulent.*

In many cases the disaffirmance of a deed made during infancy is a fraud upon the other party. But this has never been held sufficient to avoid the disaffirmance, for it would otherwise take away the very protection which the law intends to throw round him, to guard him from the effects of his folly, rashness and misconduct. In *Saunderson v. Marr*, 1 H. Bl., 75, it was held that a warrant of attorney, given by an infant, although there appeared cir-

cumstances of fraud on his part, was utterly void, even though the application was made to the equity side of the court, to set aside a judgment founded on it. So, in *Conroe v. Birdsall*, 1 Johns. Cas., 127, a bond made by an infant, who declared at the time that he was of age, was held void, notwithstanding his fraudulent declaration; for the court said that a different decision would endanger all the rights of infants. A similar doctrine was held by the court in *Curtin v. Patton*, 11 Serg. & R., 309, 310. Indeed the same doctrine is to be found affirmed more than a century and a half ago, in *Johnson v. Pie*, 1 Lev., 169; S. C., 1 Sid., 258; 1 Kebb., 905, 913. See *Bac. Abr., Infancy and Age, H.*; 2 Kent, Comm., Lect. 31.

But what are the facts on which the instruction relies as proof of the deed to Mrs. Moreland being fraudulent and void? They are "the relative positions of the parties to said deed at and previous to its execution;" that is to say, the relation of mother and son, and the fact that she had then instituted a suit against him, and arrested him, and held him to bail, as stated in the evidence, and "from the circumstances attending the execution of it;" that is to say, that Mrs. Moreland was informed by Barry, before his deed to her, that he had so conveyed the said property to Wallach, and that subsequently, and with such knowledge, she prevailed on Barry to execute to her the same conveyance. Now, certainly, these facts alone could not justly authorize a conclusion that the conveyance to Mrs. Moreland was fraudulent and void; for she might be a *bona fide* creditor of her son. And the consideration averred in that conveyance showed her to be a creditor, if it was truly stated (and there was no evidence to contradict it); and if she was a creditor, then she had a legal right to sue her son, and there was no fraud in prevailing on him to give a deed to satisfy that debt. It is probable that the instruction was designed to cover all the other facts stated in the bill of exceptions, though in its actual terms it does not seem to comprehend them. But if it did, we are of opinion that the jury would not have been justified in inferring that the deed was fraudulent and void. In the first place, the proceedings in the orphans' court may, for aught that appears, have been in good faith, and under an innocent mistake of a year of the actual age of Barry. In the next place, if not so, still, the mother and the son were not estopped in any other proceeding to set up the nonage of Barry, whatever might have been the case as to the parties and property involved in that proceeding. In the next place, there is not the slightest proof that these proceedings had, at any time, any reference to, or intended operation upon, the subsequent deed made to Wallach, or that Mrs. Moreland was party to or assisted in the negotiations or declarations on which the deed to Wallach was founded. Certainly, without some proofs of this sort, it would be going too far to assert that the jury might infer that the deed to Mrs. Moreland was fraudulent. Fraud is not presumed either as a matter of law or fact, unless under circumstances not fairly susceptible of any other interpretation.

§ 875. *Instructions should be based upon evidence.*

The fifth instruction was properly refused by the court, for the plain reason that there was no evidence in the case of any acts or declarations by Mrs. Moreland to the effect therein stated. It was, therefore, the common case of an instruction asked upon a mere hypothetical statement, *ultra* the evidence.

The third bill of exceptions is as follows: "The court having refused the second, third, fourth and fifth instructions prayed by the plaintiffs, and the counsel, in opening his case to the jury, contending that the questions presented

by the said instructions were open to the consideration of the jury, the counsel for the defendant thereupon prayed the court to instruct the jury that if, from the evidence so as aforesaid given to the jury, and stated in the prayers for the said instructions, they should be of opinion that the said Richard was under the age of twenty-one years at the time he made his deed as aforesaid to the said Richard Wallach, under whom the plaintiffs claim their title in this case, and that at the time he made his deed as hereinbefore mentioned to the defendant he was of full age, that such last mentioned deed was a disaffirmance of his preceding deed to him, the said Richard Wallach, and that in that case the jury ought to find their verdict for the defendant; and that the evidence upon which the second, third, fourth and fifth instructions were prayed by the plaintiff as aforesaid, which evidence is set forth in the instructions so prayed, is not competent in law to authorize the jury to find a verdict for the plaintiff upon any of the grounds or for any of the reasons set forth in the said prayers, or to authorize them to find a verdict for the plaintiff, if they should be of opinion that the said Richard Barry was under the age of twenty-one years at the time he made his deed as aforesaid to the said Richard Wallach.

"Which instruction the court gave as prayed, and the counsel for the plaintiff excepted thereto."

It is unnecessary to do more than to state that the bill of exceptions is completely disposed of by the considerations already mentioned. It contains no more than the converse of the propositions stated in the second bill of exceptions, and the reassertion of the instruction given by the court in the first bill of exceptions. Upon the whole, it is the opinion of the court that the judgment of the circuit court ought to be affirmed, with costs.

IRVINE v. IRVINE.

(9 Wallace, 617-630. 1899.)

ERROR to U. S. Circuit Court, District of Minnesota.

STATEMENT OF FACTS.—Ejectment. Plaintiff put in evidence a patent from the United States, founded on a pre-emption certificate. Defendant offered a deed from the plaintiff to him, prior in point of time to the patent, which was admitted over the objections of the plaintiff. Plaintiff then testified that he executed the deed during minority.

Opinion by MR. JUSTICE STRONG.

Though the exceptions found in this record are numerous, the questions which they present are few. If the answers given to the requests of the plaintiff for instructions to the jury were correct, it is certain that the objections made by him to the admission of evidence were unfounded. Those objections were all based upon the assumption that the evidence offered was immaterial and irrelevant to the issue. Whether the assumption was well grounded will be seen when we consider the law of the case as expounded in the charge to the jury.

§876. *Where a party makes a deed of land, covenanting therein to be owner thereof, and subsequently acquires an adverse or outstanding title, it inures to the benefit of the grantee, on the principle of estoppel.*

The plaintiff submitted twelve propositions, which he asked should be given to the jury as instructions. The first was in substance that the deed of May 8, 1849, from the plaintiff to the defendant, did not pass the estate acquired by the plaintiff under the patent from the United States made subsequently, to

wit, on the 8th of October, A. D. 1849, and that it would not have passed the estate had the plaintiff attained his majority before the deed was made. It is a general rule, that when one makes a deed of land, covenanting therein that he is the owner, and subsequently acquires an outstanding and adverse title, his new acquisition inures to the benefit of his grantee, on the principle of estoppel. As the deed of the plaintiff in this case contained an assertion that he was well seized in fee, and had good right to sell and convey in fee, it would not be difficult, were it necessary, to show that in taking the patent he was in law acting for his grantee.

§ 877. *Where a party has bought land from the government and has paid all the purchase money, a subsequent patent therefor does not confer a new title but merely confirms that before acquired.*

But it is not necessary to rely upon that principle. The evidence in the case was, that prior to his deed to the defendant, to wit, on the 21st of February, 1849, he had bought the land from the government, and had paid all the purchase money. The patent subsequently given to him was, therefore, not a new acquisition of title. It was only a confirmation of the right which he had acquired before the deed was made.

§ 878. *The acts of May 29, 1830, and January 23, 1832, relating to pre-emptive rights conferred upon actual settlers, do not apply to entries of land not made under them.*

But it is argued, on behalf of the plaintiff, that the deed was inoperative; because it was forbidden by the twelfth section of the act of congress of September 4, 1841, which granted pre-emption rights, and enacted that any grant or conveyance made before the entry of the land shall be null and void, except in the hands of *bona fide* purchasers for a valuable consideration. To this it may be answered, that neither that act nor the acts of May 29, 1830, and January 23, 1832, have any application to the present case. They relate to pre-emptive rights conferred upon actual settlers. The plaintiff did not enter the land in dispute under either of these, and no act of congress deprived him of the power to sell and convey *after* he had made an entry and paid all the purchase money, though before he had received his patent. The court could not then have affirmed the proposition which the plaintiff submitted.

§ 879. *The deed of an infant is not absolutely void, but only voidable at his election, upon reaching majority; and where by such deed the infant does only what the law would compel him to do, it is not even voidable.*

His second point was that the deed was void because made by the plaintiff during his minority. This the court refused to affirm. Whatever may have been the doubts once entertained, it has long been settled that the deed of an infant, being an executed contract, is only voidable at his election; that it is not void. It operates to transmit the title. And there are some cases, of which the present, in one aspect of it, may possibly have been one, in which such a deed is held to be not even voidable. They are those in which the infant, by making the conveyance, does only what the law would have compelled him to do. See *Zouch v. Parsons*, 3 Burr., 1794. Whether this was such a deed need not be considered, for conceding that it was not, clearly it was not void.

The third proposition of the plaintiff does not appear in the record. The fourth and fifth were affirmed, and the sixth was answered correctly. (a)

(a) These propositions had reference to acts in confirmation or avoidance of an infant's contracts. They are considered here in the two paragraphs following section 890.—EDITOR.

§ 880. *Ratification of a deed by an infant need not be of as solemn a character as the deed itself. What will suffice.*

The minority of the plaintiff at the time when he made his deed to the defendant was an admitted fact, and this suit was an attempt to avoid the deed. The evidence disclosed nothing that could amount to an avoidance of the deed before the suit was brought; nothing which the law recognizes as an act of avoidance. The struggle at the trial was over the question whether the plaintiff had not *confirmed* the deed after he came of age? He contended, and he asked the court so to instruct the jury, that an act of affirmance must be of as solemn a character as the deed itself. This instruction the court declined in terms, stating, however, that mere acquiescence, however long, if short of the statutory period of limitations, is not sufficient, and that an act of confirmation, if not equally solemn with the deed, must be of such a solemn and undoubted nature, of such a clear and unequivocal character, as to establish a clear intention to confirm the deed after a full knowledge that it was voidable. Certainly this was all that the plaintiff had a right to demand. There is a well recognized distinction between the nature of those acts which are necessary to avoid an infant's deed, and the character of those that are sufficient to confirm it. The authorities frequently assert that such a deed cannot be avoided except by some act equally solemn with the deed itself. Some assert that it cannot be done by anything short of an entry; and this whether the deed operates by livery of seizin, or transmits the title by virtue of the statute of uses. Others hold that it may be avoided, without a previous entry, by another deed made to a different grantee. But all the authorities recognize the doctrine that acts which would be insufficient to avoid such a deed may amount to an affirmance of it. While generally it has been held that mere acquiescence, though long continued, will not suffice; yet even that, in connection with other circumstances, may establish a ratification. *Cresinger v. Welch*, 15 Ohio, 193; *Drake v. Ramsey*, 5 Ohio, 251; *Ferguson v. Bell*, 17 Mo., 347; *Bostwick v. Atkins*, 3 Comst., 53. And where an infant had sold land, and after coming of age saw the purchaser making large expenditures in valuable improvements upon the land sold, and said nothing in disaffirmance for four years (facts very like those appearing in this case), it was held that the circumstances were not such as to excuse this long silence, and there being evidence that after he had reached twenty-one years of age he had said that he had sold the land, had been paid for it and was satisfied, and had authorized an offer to purchase it, it was ruled, as a legal conclusion, that he had confirmed his deed. *Wheaton v. East*, 5 Yerg., 41-62. So in *Wallace v. Servis*, 4 Har- ring., 75 (see, also, *Hartman v. Kendall*, 4 Ind., 405), it was adjudged that an infant's acquiescence in his deed for four years after he came of age, in view of extensive improvements made upon the property, amounted to a confirmation.

There is reason for this distinction between the effect of acts in avoidance and that of acts of confirmation. We have seen that an infant's deed is not void; it passes the title of the land to his grantee. Now, if the deed be avoided the ownership of the land is retransferred. The seizin is changed. There is fitness in a rule that title to land shall not pass by acts less solemn than a deed; that its ownership shall not be divested by anything inferior to that which conferred it. On the other hand a confirmation passes no title; it effects no change of property; it disturbs no seizin. It is therefore itself an act of a character less solemn than is the act of avoiding a deed, and it may well be effected in a less formal manner.

§ 881. *Whether the evidence showed a ratification of a deed of an infant is a question of fact for the jury, and not for the court.*

By the seventh proposition the court was asked to instruct the jury that there was no evidence of any confirmation of the deed by the plaintiff after he came of age, and that the evidence showed no affirmance. Whether the evidence showed an affirmance or not was a question for the jury and not for the court, if there was any tending to show it; and that there was is beyond doubt. Had there been nothing more than the lease of a part of the land conveyed, a lease made by the defendant to the plaintiff, with others, on the 8th of May, 1854, it would have been impossible for the court to have withheld from the jury the inquiry whether the plaintiff had not confirmed his deed, or to have declared there was no evidence of confirmation. True the lease was not for the particular parts of the land conveyed by the deed which are the subjects of the present suit, but it was still very significant. The defendant held the part demised by the same title by which he claims the lots now in dispute, to wit, under the plaintiff's deed. He held by no other right. the deed was effective to assure to him the premises demised, it was equally so to protect him in the ownership of the lots, for it conveyed the whole property, the lots and the demised premises. When, therefore, the plaintiff signed and sealed the lease, he acknowledged by a solemn act that the defendant rightfully held under the deed. It might well have been inferred from this that he intended to assent to the conveyance he had made. There was other evidence of ratification, but this suffices to show that the plaintiff's proposition was inadmissible.

§ 882. *An infant may be a trustee and may be compelled to execute the trust. If he affirm and ratify, after coming of age, he cannot deny that the trust existed.*

The eighth and tenth points relate to some evidence that had been given, tending to show an employment of the plaintiff by the defendant to enter the land for him, and that the plaintiff paid for it with the defendant's money, furnished to him for that purpose. The court was asked to instruct the jury that no trust or agency had been shown which could have been enforced. We do not perceive how the court could rightfully have affirmed what was asked. An infant may undoubtedly be a trustee and be compelled to execute his trust. Especially, if after he came of age, he affirms the trust, and ratifies the acts which he did in accordance with the trust, will it be out of his power to deny that any trust ever existed. But we need not discuss this subject; it is of small importance to the case. It is enough that, in our opinion, it was not for the court to deny that there had been a resulting trust, and had they denied it the plaintiff would have gained nothing. The controlling question, the one submitted to the jury, was whether he had conveyed his interest, whatever it might have been, to the defendant, and whether he had confirmed his conveyance after he attained his majority.

§ 883. *An instruction embodying an abstract question not raised by anything in the case is properly refused.*

The ninth request for instruction presented an abstract question not raised by anything in the case. The court did well to decline answering it. Certainly it should not have been affirmed. The eleventh proposition was affirmed, and the twelfth was correctly answered, as we have shown in our remarks upon the seventh.

We have thus reviewed the entire record and have found no error. If any-

thing has been left unnoticed it is because we consider it unimportant. The plaintiff has himself well summed up the case by stating that there are but two questions presented by it: "First, was the deed of May 8, 1849, void by reason of its contravening the act of congress of September 4, 1841, or ineffectual to pass the subsequently acquired title and estate of the plaintiff under the patent of October 8, 1849? Second, if the deed was merely voidable by reason of the infancy of the grantor, did he, after he came of age, affirm it?" The first we have answered in the negative, and the second was properly submitted to the jury. The judgment of the circuit court is affirmed with costs.

SIMS v. EVERHARDT.

(12 Otto, 300-313. 1880.)

APPEAL from U. S. Circuit Court, District of Indiana.

STATEMENT OF FACTS.—Mrs. Sims, being an infant and a *feme covert*, executed a deed of her property in 1847, signing at the same time a declaration that she was of full age. In February, 1870, she became *discover*t, by divorce from her husband for his fault, and in March or April disaffirmed her conveyance and brought suit for the land. Her bill was dismissed and she appealed.

§ 884. *In Indiana the deed of a feme covert who is also an infant is not void, but voidable, her husband joining in the conveyance.*

Opinion by MR. JUSTICE STRONG.

Assuming, as we think it must be assumed, and as it is certainly held in Indiana, that the deed of Mrs. Sims, in which her husband joined, though made during her minority, was not void as against her, but only voidable, and hence that it was incumbent upon her to disaffirm it within a reasonable time after she came of age, the inquiry is still to be met, what was a reasonable time under the circumstances of the case? She gave notice of her disaffirmance almost immediately after she became *discover*t,—certainly within less than two months. This was, however, a little more than twenty years after she attained her majority.

The circuit court dismissed the complainant's bill for the reason that it did not appear she had disaffirmed the deed of May 28, 1847, within a reasonable time after the attainment of her majority, being of opinion that the rule was established in Indiana, she must have so disaffirmed it, notwithstanding her coverture; that is, in the same time as if she had been *discover*t.

§ 885. *The law of Indiana does not require that a feme covert shall, within a reasonable time after attaining her majority, being still covert, disaffirm a deed executed while an infant and feme covert.*

We find no decision of the Indiana courts that ought to be regarded as establishing that rule. The case relied upon by the appellees in support of the judgment of the circuit court is *Scranton v. Stewart*, 52 Ind., 68. The facts of that case, it must be admitted, were in some respects like those of the present, though in others essentially different. The plaintiff was at the time of her marriage an infant, aged sixteen. She was then seized in fee-simple of a tract of land, containing forty-five acres, and also of an undivided interest in another tract. On the 2d day of March, 1864, when she was in the nineteenth year of her age, she and her husband conveyed the lands to one George W. Stewart, for a consideration of \$2,500, a considerable part of which was paid. Mrs. Scranton came of age on the 12th of January, 1867, gave notice to Stewart of her disaffirmance of the deed on the 22d of July, 1870, and shortly after

brought her action to recover the land. This was more than three years and a half after she had attained her majority. The supreme court held that her disaffirmance was in time. It was all the case required. But the judge went on to declare that a married woman who has made a deed of her lands during her infancy and coverture must disaffirm it within a reasonable time after she arrives at age, notwithstanding her coverture, and that the fact of the continued coverture would not extend the time for the disaffirmance. All this was *obiter*. It had nothing to do with the case before the court. Nothing in the facts or the judgment required the assertion of such a rule. And it is observable that it was said in a case in which it appeared the married woman was seized of her land before her marriage, and that she was married in 1864, after the statutes of the state had greatly enlarged the power of a *feme covert* over her property. Those statutes had given her the rights of a *feme sole* in regard to her lands, and empowered her to sue as such without joining her husband. They had denied to a husband the rights which at common law he acquired in the wife's property by the marriage. They had made her lands and the profits of them her separate property as fully as if she was unmarried, with the single exception that she could not incur or convey them except by deed in which her husband should join. The effect of the state statute, touching the marriage relation and the liabilities incident thereto, was in part considered in *Miles v. Lingerinan*, 24 Ind., 385, where it was said by the supreme court of the state: "Under our present statute the wife may bring her action in regard to her own estate as though she were a *feme sole*. Still our legislature has seen proper to continue the protection formerly accorded to her as a *feme covert*, although as to her power to disaffirm her contracts made during minority her legal disability has been removed. She has the legal power to disaffirm her contracts made during infancy, and to bring her action without the assent, and even against the will, of her husband." This language, if not a positive assertion of its converse, contains at least a strong implication that her power to disaffirm a conveyance made by her during infancy did not exist at common law, or before the statutes of 1847 and 1852 were enacted.

We find nothing in any prior decision of the Indiana courts that sustains what was said *obiter* in *Scranton v. Stewart*. *Law v. Long*, 41 Ind., 586, to which reference has been made, decided that the deed of a minor, conveying her land for a valuable consideration, is voidable only and not void, and that the right to avoid it on coming of age is a personal privilege of the minor and her heirs. It also decided that when the act of an infant is executed, as when a deed has been made and delivered, the infant must, on attaining full age, do some act to disaffirm the contract, and that such act must precede the commencement of an action. But the case did not define what is a reasonable time, or rule that if the wife came of age during coverture she was bound to disaffirm the contract notwithstanding her coverture, as if she was a *feme sole*. In that case the conveyance was made by the wife and her husband before the act of 1852 was passed. He died in 1852. She married again in 1853, and came of age in 1854. Her second husband died in 1864, and she married a third time in 1868. It was not until after her third marriage that her suit was brought. She had been *discovert* during more than four years after her deed was made, and after she had reached her majority, and yet she had taken no step or done any act to disaffirm the deed prior to the institution of her suit.

No intimation is given in the case that she was bound to disaffirm or could disaffirm during her coverture. Nothing, therefore, in *Law v. Long* supports what was said, but not decided, in *Scranton v. Stewart*.

§ 886. *How far the law as it exists at the time of marriage controls the disabilities and rights of a feme covert.*

But if the law was accurately stated in the opinion given by the court in *Scranton v. Stewart*, as applicable to a deed of her lands made by an infant *feme covert* after the statute of 1852, it by no means follows that it should rule the present case. There is a radical difference in the facts of the two cases. Mrs. Sims was married before the act of 1852 or that of 1847 was passed, and while the common law relative to the marriage relation existed. By the marriage her husband acquired a vested freehold interest in her lands, and became entitled to the rents and profits. His control over the usufruct thereof became absolute. His interest extended during their joint lives, or at least as long as the marriage relation continued. It was an interest capable of sale. When, therefore, the deed was made to Mrs. Everhardt in 1846, it gave to the grantee the wife's right, subject to disaffirmance, and the husband's right to the possession and enjoyment of the profits absolutely. When the wife subsequently came of age she continued powerless to disturb the possession of the grantee, as long as her coverture lasted; for the grantee held not only her right, but that also of her husband. The most she could have done was to give notice that she would not be bound by her deed. Was she required to do that? To answer the question, it is important to keep in mind her condition at common law. The land was not her separate estate, such as the wife had in *Scranton v. Stewart*. In regard to it she was *sub potestate viri*, incapable of suing or making any contract without her husband's assent. She could not even receive a grant of land if her husband dissented. Her disability during her coverture was even greater than that of an infant, and it is settled that an infant cannot disaffirm his deed while his infancy continues. *Zouch v. Parsons*, 3 Burr., 1794; *Roof v. Stafford*, 7 Cow., 179. The reason is that a disaffirmance works a reinvestiture of the estate in the infant, and he is presumed not to have sufficient discretion for that. Why should not the greater disability of coverture be attended with the same consequences? If a wife cannot contract about any land which is not her separate property, how can she, without the concurrence of her husband, do any act, the effect of which is to transfer the title to land from another to herself?

§ 887. *What is a reasonable time for a married woman, after attaining her majority, to disaffirm a deed made during her minority.*

We are not, however, called upon by the exigencies of this case to decide that a wife cannot, during her coverture, disaffirm a deed which she made during her infancy. The question now is, whether Mrs. Sims did disaffirm her deed within a reasonable time after she attained her majority. What is a reasonable time is nowhere determined in such a manner as to furnish a rule applicable to all cases. The question must always be answered in view of the peculiar circumstances of each case. *State v. Plaisted*, 43 N. H., 413; *Jenkins v. Jenkins*, 12 Ia., 195, and numerous other cases. It must be admitted that, generally, the disaffirmance must be within the period limited by the statute of limitations for bringing an action of ejectment. A much less time has, in some cases, been held unreasonable. It is obvious that delay in some cases could have no justification, while in others it would be quite reasonable.

§ 888. *Under the statute of limitations, one laboring under two disabilities is not bound to sue until both are removed.*

Now, in this case, though there was no disaffirmance for nearly twenty-one years after Mrs. Sims attained her majority, there were very remarkable reasons for the delay, sufficient, in our opinion, to excuse it. When the deed was made she was laboring under a double disability — infancy and coverture. Even if her deed and that of her husband had not conveyed his marital right to the possession and enjoyment of the land, she would have been under no obligation, imposed by the statute of limitations, to sue until both the disabilities had ceased; that is, until after 1870. It is an acknowledged rule that, when there are two or more co-existing disabilities in the same person when his right of action accrues, he is not obliged to act until the last is removed. 2 Sugden, Vendors, 103, 482; *Mercer v. Selden*, 1 How., 37. This is the rule under the statute of limitations. But Mrs. Sims could not sue until after her divorce, and until the right the husband acquired by his marriage terminated. And had she given notice during her coverture of disaffirmance of her deed, it was in the power of her husband to disaffirm her disaffirmance. 2 Bishop, *Married Women*, sec. 392. Giving notice, therefore, which was all she could do, would have been a vain thing. The law does not compel the performance of things that are vain. Mr. Bishop, in his work to which we have referred, says that if an infant, who is also a married woman, makes an instrument voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended. Section 516. In support of this he refers to *Dodd v. Benthall*, 4 Heisk. (Tenn.), 601, and *Matherson v. Davis*, 2 Coldw. (Tenn.), 443. These cases certainly sustain the rule stated in the text. In the former, it was decided that an infant, who is also a married woman, has the option to dissent from her deed within a reasonable time after her discoveriture, though her coverture may continue more than twenty years. And if this were not so, the disability of coverture, instead of being a protection to the wife, as the law intends it, would be the contrary. We have found no decision that is in conflict with this doctrine, and no *dicta* even, except those in *Scranton v. Stewart*. And why should the rule not be thus? The person who takes a deed from an infant *feme covert* knows that she is not *sui juris*, and that she will be under the control of her husband while the coverture lasts. He is bound to know, also, that she has the disability of infancy. He assumes, therefore, the risk attending both those disabilities.

But the continued coverture of Mrs. Sims, after she attained full age, is not the only circumstance of importance to the inquiry whether she disaffirmed her deed within a reasonable time. The circumstances under which the deed was made are to be considered. There is evidence that she was constrained by her husband to execute the deed; that his conduct toward her was abusive, violent and threatening, in order to induce her to consent to the sale; that she was intimidated by him; that a look from him would make her do almost anything, and that she was in a weak and nervous condition. It is not strange that a woman bound to such a husband should delay during her coverture disaffirming a contract which he had forced her to make.

Add to this that she had very little opportunity to disaffirm until after her divorce. Before she had reached her majority she removed to another state, and never returned to the neighborhood of the property to reside. Between 1848 or 1849 and 1870, she made but two visits to Laporte, both on account of

sickness or the death of a relative, and neither visit was prolonged beyond three days. It is not a case, therefore, of standing by after she came of age and seeing her property in the enjoyment of another.

And again, she never did any act after her deed was made and after she came of age expressive of her consent to it or implying an affirmance of the contract. The most that is alleged against her is that she was silent during her coverture. But silence is not necessarily acquiescence.

We are aware that the decisions respecting the disaffirmance of an infant's deed are not in entire harmony with each other. While it is generally agreed that the infant to avoid it must disaffirm it within a reasonable time after his majority is attained, they differ as to what constitutes disaffirmance and as to the effect of mere silence. Where there is nothing more than silence, many cases hold that an infant's deed may be avoided at any time after his reaching majority until he is barred by the statute of limitations, and that silent acquiescence for any period less than the period of limitation is not a bar. Such was in effect the ruling in *Irvine v. Irvine*, 9 Wall., 617 (§§ 876-83, *supra*). See, also, *Prout v. Wiley*, 28 Mich., 164, a well-considered case, and *Lessee of Drake v. Ramsey*, 5 Ohio, 251. But, on the other hand, there appears to be a greater number of cases which hold that silence during a much less period of time will be held to be a confirmation of the voidable deed. But they either rely upon *Holmes v. Blogg*, 8 Taunt., 35, which was not a case of an infant's deed, or subsequent cases decided on its authority, or they rest in part upon other circumstances than mere silent acquiescence, such as standing by without speaking while the grantee has made valuable improvements, or making use of the consideration for the deed. We think the preponderance of authority is that, in deeds executed by infants, mere inertness or silence, continued for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts, manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid the deed. And those confirmatory acts must be voluntary. As we have said, one who is under a disability to make a contract cannot confirm one that is voidable, or, what is the same thing, cannot disaffirm it. An affirmance or a disaffirmance is in its nature a mental assent, and necessarily implies the action of a free mind, exempt from all constraint or disability.

In view of these considerations our conclusion is that Mrs. Sims, the complainant, having been a *feme covert* until 1870, and never having done, during her coverture, any act to confirm the deed which she made during her infancy, could effectively disaffirm it in 1870, when she became a free agent, and that her notice of disaffirmance and her suit avoided her deed made in 1847.

§ 889. *An infant is not bound by an estoppel in pais.*

The remaining question is whether she is estopped by anything which she has done from asserting her right to the land in controversy. In regard to this very little need be said. It is not insisted that she did anything since she attained her majority which can work an estoppel. All that is claimed is that when she made her deed she asserted that she was of age and competent to convey. We are not, therefore, required to consider how far a married woman can be estopped by her acts when she has the single disability of coverture. The question is, whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities

are all one way. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. *Brown v. McClune*, 5 Sandf., 224; *Keen v. Coleman*, 39 Pa. St., 299. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed.

It is, however, unnecessary to dilate upon this branch of the case. The judgment of the circuit court was not rested upon any estoppel of the complainant. Our conclusion upon the whole matter is that the complainant was entitled to the decree for which she asked. The decree will be reversed, and the record remitted with instructions to enter a decree in accordance with this opinion and it is so ordered.

HYER v. HYATT.

(Circuit Court for the District of Columbia: 8 Cranch, C. C., 276-283. 1837.)

STATEMENT OF FACTS.—Action on acceptance of a bill of exchange. Defense, infancy of the defendant. It was asserted that defendant made a new promise after attaining his majority, and another after the commencement of this suit.

Opinion by CRANCH, J.

I am inclined to think that no contract entered into by an infant is absolutely void, although all contracts by infants, except for necessities, are voidable. There are some *dicta* that contracts made by an infant to his prejudice are void, not voidable; but I doubt whether, in law, there be any difference as to validity between those which are beneficial and those which are prejudicial to the infant; both are voidable, but neither is absolutely void. (a)

§ 890. *Whether the contract of an infant is voidable, not void.*

There is no case in which it has been decided that a contract between an infant and an adult can be avoided by the adult, upon the ground of the infancy of the other party. If the contract were absolutely void, neither party would be bound: The question whether the contract be prejudicial to the infant is a question of fact, not of law, and is too uncertain to become the test of the validity of the contract. It is a question which depends upon many circumstances, and cannot always be ascertained at the time of the contract.

In *Baylis v. Dinely*, 3 Maule & Sel., 477, it was held by the court of K. B., that a bond by an infant in the penalty of £100 to pay £50 with interest was clearly, upon the face of the instrument, to the prejudice of the infant, and that it could not be confirmed by parol so as to give it effect. The action, in that case, was upon the bond. Plea, infancy. Replication, that the defendant, after full age, "assented to, ratified and confirmed the said writing obligatory." Demurrer and joinder; and judgment for the defendant on the demurrer. The court did not say that the bond was absolutely void, but that it could not be set up as a bond, by a parol confirmation. In the argument of the case, Campbell, for the defendant, contended that the bond was void *ab origine*, and could not be ratified in any way. He cited Com. Dig., tit. *Enfant*, ch. 2; Bac. Ab., Infancy, 1; Bul. N. P., 182; *Ayliff v. Archdale*, Cro.

(a) *Quare*, as to the correctness of this dictum.—*Editor*.

Eliz., 920; Delavel *v.* Clare, Noy, 35; Edmunds *v.* Burton, cited in Stone *v.* Wythipol, Cro. Eliz., 127, and Thompson *v.* Leach, 3 Mod., 310.

The first case cited by Comyns (C. 20) is Lane *v.* Cowper, Moore, 105 (7 Eliz.), which case was several times argued, and at length by all the judges in bank openly. The seventh question was, "whether the lease of an infant, without rent reserved, be void, or voidable; and they all, except Gawdy, agreed that it is void, because there is no consideration; but if rent had been reserved, it would have been only voidable. So a feoffment made with the proper hand of an infant is only voidable; and they said that any stranger might take advantage of this" (that is, the want of consideration) "by way of allegation, evidence or otherwise."

2. The second authority cited by Comyns is Perkins, Grant, 13, who says "that all gifts, grants or deeds made by an infant, which do not take effect by delivery of his hand, are void. But gifts, grants or deeds made by an infant by matter in deed or in writing, which take effect by delivery of his hand, are voidable by himself and his heirs, or by those which shall have his estate. And therefore, if an infant make a deed of feoffment, and a letter of attorney to a stranger, to make livery of seizin, and he makes livery of seizin by force thereof, he shall be taken for a disseizor. And if an infant, being seized of a curve of land, grant a rent-charge to be issuant out of the same curve, by deed, and the grantee distrain, he shall punish him as a trespasser, notwithstanding that the infant did deliver the deed with his own hand. But in such case the infant, nor his heir, nor his feoffee, cannot, against such a deed in pleading, say that he did not grant by the deed; for that the deed is not void, but voidable; as to say that the grantor was within age, etc., at the time of the grant," etc. "And an infant shall be bound by all acts done by him during his nonage, which acts are for his advantage, unless in some special cases." See Perkins, Grant, 12, 13, 14.

3. The third authority cited by Comyns is Thompson *v.* Leach, 3 Mod., 310. The question in that case was, whether a deed of surrender by a person *non compos mentis*, was absolutely void as against the remainder-man, so as to destroy the intermediate estate which was to support the contingent remainder; or whether it was voidable only by himself and his heirs. "It was likened to the case of infancy," and the court said, "there are express authorities that a surrender by an infant is void." Lloyd *v.* Gregory, Cro. Car., 502. "If an infant grant a rent-charge out of his estate, it is not voidable, but *ipso facto* void; for if the grantee should distrain for the rent, the infant may have an action of trespass against him." "In all these cases which have been cited, where it is held that the deeds of infants are not void, but voidable, the meaning is, that *non est factum* cannot be pleaded, because they have the form though not the operation of deeds, and therefore are not void upon that account, without showing some special matter to make them of no efficacy. Therefore, if an infant make a letter of attorney, though it is void in itself, yet it shall not be avoided by pleading *non est factum*, but by showing his infancy. Some have endeavored to distinguish between a deed which gives only authority to do a thing, and such which conveys an interest by delivery of the deed itself, that the first is void, and the other voidable; but the reason is the same to make both void; only where a feoffment is made by an infant, it is voidable because of the solemnity of the conveyance."

4. In the case of Lloyd *v.* Gregory, cited above from Cro. Car., 502, "all the court held that a surrender of an infant cannot be by deed, but it is abso-

lutely void; and that a surrender, by acceptance of the second lease, is void because it is without increase of his term or decrease of his rent; and where there is not an apparent benefit, or the semblance of a benefit, his acts are merely void; and here is no benefit nor appearance of any to the infant, for he hath no manner of advantage thereby, but cause of quarreling by this lease." But see *Zouch v. Parsons*, cited below, and *Bac. Ab.*, by Gwillim, tit. *Infancy and Age*, I. 1, 2, 3, etc. See, also, the following cases:

Monning v. Knappe, 1 Roll. Ab., 18, l. 50. If an infant enter into an obligation to pay a certain sum of money, and the obligee bring debt upon the obligation, and procure a *latitat* to arrest him, and the obligor being of full age, and knowing this, say to the obligee that, if he would not arrest him, he will pay the money, this is no consideration to maintain the action, inasmuch as the infant might have avoided the obligation by plea.

Hill v. Whittingham, 1 Roll. Ab., 729, l. 15. If an infant be a mercer and buy goods to sell again, he is not chargeable upon the contract.

Williams v. Harrison, Carth., 160. So if he give a bill of exchange.

Manby v. Scott, 1 Mod., 137. Judge Hide's *dictum* cites 21 H. 7, 39; 26 H. 8, 2. If an infant give or sell goods and deliver them with his own hand, he shall have no action of trespass against the donee or vendee, by reason of the delivery; but if an infant give or sell goods, and donee or vendee takes them by force of the gift or sale, the infant may have an action of trespass against him.

Bro. Ab., *Coverture and Infancy*, pl. 1. "*Nota per curiam*; if an infant grant an advowson by his deed, and at full age confirm the same grant, yet it is of no value, for the first grant was void. But if he give goods, and deliver them with his own hands, trespass does not lie. The same law of feoffment and livery by the infant himself, and not by attorney, it is voidable and not void. Note the diversity; and so see that the delivery of the deed of an infant is not like the delivery of land or goods by him. 26 H. 8, 2."

Br. Ab., *Coverture and Infancy*, pl. 26. "*Vide* tit. *Trespas*. The gift of an infant is void; and yet if he deliver the goods to the donee, this is a good excuse in trespass; contrary if the donee take them by virtue of the gift; and the law appears to be the same where the infant makes a feoffment, and makes livery in person. *E contra*, if he make a letter of attorney to make livery, who does it, trespass lies. 22 H. 6, 3."

Id., pl. 28. "*Debt*. Per Brudnel: If an infant make an indenture, and at full age bind himself to perform it, he shall not avoid the indenture. And if an infant sell a horse for £10, and bring debt for the £10 at full age, he shall not avoid the contract; and the law is the same if he make a lease reserving rent within age, and accept rent at full age. 14 H. 8, 29."

Id., pl. 12. "*Dum fuit infra ætatem* was brought of a rent (tit. *Dum fuit infra ætatem*, 1), and so see that the grant of an infant is not void, as it is there admitted; and by Kirton, if an infant within age, seized of rent, purchase the land, etc., and aliene the land within age, he shall have election whether he will demand the land or the rent; which was not denied. 46 E. 3, 33, 34."

Br. Ab., tit. *Dum fuit infra ætatem*, 1, referred to as above. "The writ of *Dum fuit infra ætatem* was brought of land and rent, against the alienee of the father of the demandant. And note here that the writ was admitted to lie of the rent; and yet some say that the grant of an infant is void, and not voidable; which is not so, as is here apparent; for then action would not lie; and also the delivery of the deed cannot be void, but voidable. 46 E. 3, 34."

Bro. Ab., tit. Coverture and Infancy, pl. 40. "*Mort d'ancestor.*" "It was clearly held that a release by an infant of all his right in land of which he was never seized is void, so that another who is of the half-blood shall have the land as heir of their common ancestor, if he who released die without issue; but otherwise it is said of a feoffment: the reason of which diversity seems to be the livery of the land: this is only voidable, the other is void. 34 Ass., pl. 10."

Bro. Ab., tit. Trespass, pl. 338. "Per Brian and Littleton, justices: If an infant lease his land for years, where there is no livery, and the lessee enter, the infant shall have trespass without re-entry, for it is void as to the infant, where there is no livery. And where he sells his goods, he may elect to have debt upon the sale, or debt for the rent reserved upon the lease, or to have trespass for the lands or goods, for it is void at his election. But where the infant delivers a horse, or bails goods, trespass does not lie. And if an infant make exchange, he shall have assize; and *e contra* if it be by deed and delivery of seizin, for there is a livery; and this livery ought to be made by himself; and *e contra* where it is made by attorney. But where action is brought against an infant, there he may plead nonage. 18 E. 4, 1, 2."

In the case of *Zouch v. Parsons*, 6 Burr., 1803, 1804, the judges were all of opinion that a conveyance made by an infant mortgagee to a third person, at the request of the mortgagor, who had redeemed the property, bound the infant. The court also agreed with Perkins (§ 12), that the deeds of infants which do not take effect by delivery of his hand are void; but that those which do take effect by delivery of his hand are voidable by himself, by his heirs, and by those who have his estate. That there is no difference in this respect between a feoffment and deeds which convey an interest. The reason is the same. Littleton (§ 229) says they all serve for nothing, "and may be avoided."

Lord Mansfield, in 3 Burr., p. 1805, says, "an infant, and they who stand in his place, cannot plead *non est factum* and give the infancy in evidence; but they must plead the infancy specially, to avoid the deed; and that plea avoids it by relation back to the delivery. The reason of this is, because it has an operation from the delivery, and not because it has the form of a deed," as stated in *Thompson v. Leach*, 3 Mod., 310.

He says further, in pp. 1806, 1807, that a lease by an infant by deed, upon which no rent is reserved, is not absolutely void; nor is a surrender by an infant. See, also, Bac. Ab., by Gwillim, tit. Infancy and Age, I., 1, 2; *Forrester's Case*, 1 Sid., 41; *Farnham v. Atkins*, 1 Sid., 446; *Davis v. Mannington*, 2 Sid., 109; 2 Roll. Ab., 21, e. 10, *Faits, A.*; *Ball v. Heskest*, Comb., 381; *Southerton v. Witlock*, 1 Str., 690; *Whitney v. Dutch*, 14 Mass., 457; 4 Starkie on Ev., 725.

In *Thornton v. Illingworth*, 2 Barn. & Cress., 824, the action was *assumpsit* for goods sold to the defendant, for the purpose of trade. Plea, infancy. Replication, that the defendant ratified the contract after he came of age. The question was whether evidence of a new promise, made after the commencement of the action, would support the issue on the part of the plaintiff. The counsel for the defendant were stopped by the court; and in taking the distinction between the plea of infancy and of the statute of limitations, Bayley, J., said, "in the case of an infant, a contract made for goods for the purposes of trade is absolutely void; not voidable only." "If he makes a promise after he comes of age, that binds him, upon the ground of his taking upon himself

a new liability, upon a moral consideration existing before; it does not make it a legal debt from the time of making the bargain."

Holroyd, J., said, "Here no ground of action, capable of being enforced in a court of law, existed at the time when the action was brought; there was no foundation upon which the action could rest. The new promise was the sole ground of action, and not the revival of an old one." Littledale, J., said, "When the statute of limitations is relied upon, an acknowledgment admits the perpetual existence of the debt; and therefore it suffices, whether it is made before or after the bringing of the action. But the contract of an infant, under such circumstances as the present, being void, and not voidable, the promise, in this case, did not prove that any legal cause of action existed at the time when the cause of action was commenced."

The *dicta* of Judges Bayley and Littledale, that the contract of an infant for the purpose of trade "was absolutely void, not voidable only," are in direct contradiction to the whole current of English decisions. There is not, I believe, a previous case to be found in which such a contract has been decided to be so absolutely void that the infant, when he arrives at full age, cannot confirm it; and I am strongly inclined to think, as I have before observed, that no contract by an infant is absolutely void by reason of infancy alone; but that they are all voidable, unless for necessities; and that even on a contract by an infant for necessities, the plaintiff can only recover their value, the infant not being competent to bind himself absolutely as to the prices. Chitty on Bills, part 1, c. 2, p. 20.

§ 891. *A promise made after full age, to pay an acceptance given during the minority of the acceptor, will bind him; but not a promise made after the commencement of the suit.*

In the present case of Hyer and Bremner v. Hyatt and Wilson, I am of opinion that the acceptance of the draft by the infant, for a valuable consideration, and his moral obligation to pay it, are a good consideration of a new promise made after his full age; but that a promise made after the commencement of the action (and *a fortiori*, an acknowledgment) cannot be given in evidence, or, if given, cannot alone support the issue on the part of the plaintiff.

THURSTON, J., concurred. MORSELL, J., dissented upon the last point.

INSURANCE COMPANY v. BANGS.

(18 Otto, 435-441. 1880.)

ERROR to U. S. Circuit Court, District of Minnesota.

STATEMENT OF FACTS.—This was a suit brought by Edson C. Bangs against the New York Life Insurance Company to recover the amount insured by defendant on the life of his father, James H. Bangs, in two policies of \$5,000 each. The suit was originally brought in a state court of Minnesota, but was removed by defendant into the circuit court of the United States for the district of Minnesota. The defense set up was that James H. Bangs had fraudulently committed suicide.

The answer was filed in December, 1876, and in June, 1877, the company filed a supplemental answer, in which, in greater detail, the defense stated in the first answer was repeated, and the additional ground taken that in the circuit court of the United States for the district of Michigan the company had filed a bill to enjoin the plaintiff and his mother from setting up the policies and

had obtained a decree as desired. The record in the case showed that in the equity suit no process had been served on the infant, the plaintiff here, who in fact had left the state and gone to Minnesota to reside, but only on his general guardian, upon whose refusal to act in the matter one Harmon was appointed guardian *ad litem*, who answered for the infant. The record in the Michigan equity case was made a part of the supplemental answer and a demurrer was filed to it, which was sustained. Judgment was rendered for the plaintiff, and defendant sued out a writ of error.

Opinion by MR. JUSTICE FIELD.

As seen from the statement of the case, the only matter for our consideration relates to the validity of the decree of the circuit court of the United States for the district of Michigan, and that depends upon the solution of the question whether the court had jurisdiction of the person of the infant, Edson C. Bangs, the plaintiff here, and of the subject-matter of the suit upon which it acted.

§ 892. *Jurisdiction of courts of equity over the persons and property of infants.*

From the view we take of the case, it will only be necessary to examine the proceedings to see whether the infant was ever brought before the court so as to justify the appointment of a guardian *ad litem* for him. The general authority of courts of equity over the persons and estates of infants, upon which counsel have so much dwelt, is not questioned. It may be exerted, upon proper application, for the protection of both. This jurisdiction in the English courts of chancery is supposed to have originated in the prerogative of the crown, arising from its general duty as *parens patriæ* to protect persons who have no other rightful protector. But partaking, says Story, as the prerogative does, more of the nature of a judicial administration of rights and duties *in foro conscientiæ* than of a strict executive authority, it was very naturally exercised by the court of chancery as a branch of its original general jurisdiction. "Accordingly," he adds, "the doctrine now commonly maintained is that the general superintendence and protective jurisdiction of the court of chancery over the persons and property of infants is a delegation of the rights and duty of the crown; that it belonged to that court, and was exercised by it from its first establishment; and that this general jurisdiction was not even suspended by the statute of Henry VIII., erecting the court of wards and liveries." The jurisdiction possessed by the English courts of chancery from this supposed delegation of the authority of the crown as *parens patriæ* is more frequently exercised in this country by the courts of the states than by the courts of the United States. It is the state and not the federal government, except in the territories and the District of Columbia, which stands, with reference to the persons and property of infants, in the situation of *parens patriæ*. Accordingly provision is made by law in all the states for the appointment of such guardians, whose duties and powers are carefully defined.

§ 893. *Limitations of the powers of federal courts over infants.*

The authority of the federal courts can only be invoked within the limits of a state for such an appointment where property of the infant is involved in legal proceedings before them, and needs the care and supervision of an officer of that kind. In such a case, to preserve the property from destruction or waste, the federal courts may appoint a guardian to take care of it pending the proceedings. And those courts will always see that a proper guardian *ad litem* has charge of the infant's interests where his property is involved in proceed-

ings before them. This is the extent of their authority. Nothing is gained, therefore, in this case by reference to the general power of courts of equity over the persons and property of infants. The infant Bangs possessed no property in Michigan when the suit in equity was commenced against him. That suit did not concern any property, real or personal. It was brought to cancel a contract made with his father, and any decree respecting it would necessarily have been *coram non judice*, unless the parties interested were before the court upon the service of a subpoena or their voluntary appearance. The infant, being absent from the state, could not be personally served.

§ 894. *United States courts are not authorized by the statutes of Michigan to dispense with proper personal service of process on infants.*

The statute of Michigan requiring the general guardian of an infant to "appear for and represent his ward in all legal suits and proceedings, unless when another person is appointed for the purpose as guardian or next friend," does not change the necessity of service of process upon the defendants in a case before a court of the United States where a personal contract alone is involved. It may be otherwise in the state courts; it may be that, by their practice, the service of process upon the general guardian, or his appearance without service, is deemed sufficient for their jurisdiction. We believe that in some states such is the fact; but the state law cannot determine for the federal courts what shall be deemed sufficient service of process or sufficient appearance of parties. Substituted service, by publication, against non-resident or absent parties, allowed in some states in purely personal actions, is not permitted in the federal courts. Such service can only be resorted to where some claim or lien upon real or personal property is sought to be enforced, and the decision of the court will then only affect property of the party within the district. R. S., sec. 738.

§ 895. *Process required in cases involving the cancellation, etc., of personal contracts.*

In all cases brought to enforce or cancel personal contracts, or to recover damages for their violation, the statute requires a personal service of process upon the defendants, or their voluntary appearance. And the equity rules qualify the statute only so far as to allow, in cases of husband and wife, a copy of the subpoena to be delivered to the husband, and in other cases a copy to be left at the dwelling-house or usual place of abode of the defendant, with some person who is a member of or resident in the family. In either mode, the defendant is to be served within the district, and until such service or his appearance, the court has no jurisdiction to proceed or to render a decree affecting his rights or interest. There being here no property of the infant defendant within the district of Michigan, which the court could lay hold of, and he being absent from it, there was no foundation laid for any progress by the court in the case. It never acquired jurisdiction over the infant; it could, therefore, appoint no guardian *ad litem* for him, and the decree rendered against him was ineffectual for any purpose.

§ 896. *Cases cited.*

Our attention has been called to several cases of the state courts, in which it has been held that a decree or judgment could not be collaterally attacked, though rendered in a case where a guardian *ad litem* had been appointed without service of process on the infant. Such are the cases of *Preston v. Dunn*, 25 Ala., 507; *Robb v. Irwin*, 15 Ohio, 689; and *Gronfier v. Puymirol*, 19 Cal., 629. All of them are illustrative of the position we have

stated; they all relate to the interest of the infant in real property in the state.

In *Preston v. Dunn*, the bill was filed by an infant, suing by his next friend, to redeem a tract of land which had once belonged to his father, who had mortgaged it, and which had been sold under judicial decree in a foreclosure suit, and purchased by the defendant. The father having died pending the foreclosure suit, and a posthumous child to him having been born, a bill of revivor was filed against the administrator and administratrix of his estate, and his infant son. A subpoena was served on the adult defendants, and a guardian *ad litem* was appointed by the court for the infant, who appeared for him. It was held by the supreme court of Alabama that the decree rendered upon such appearance was irregular, but not void, and that it could not be attacked collaterally.

In *Robb v. Irwin*, it appeared that a guardian *ad litem* for infant heirs had been appointed in a proceeding for the sale of certain real property in which they were interested. In an action of ejectment subsequently brought by the heirs, it was held by the supreme court of Ohio that the proceeding was not vitiated by the appointment of the guardian *ad litem*, without previous service of process on the infant.

In *Gronfier v. Puymirol*, a general guardian of the estate of non-resident infants had been appointed by the probate court upon the representation that they were interested in certain real property in the state. In proceedings for a sale of such property, the general guardian appeared for the infants without being appointed guardian *ad litem* for them, and it was held by the supreme court of California that the court had jurisdiction to order the sale and that it passed a good title; and that under the practice of the state a general guardian could appear in legal proceedings for his ward when a guardian *ad litem* was not appointed by the court.

§ 897. *Personal service of process upon an infant is necessary to give a circuit court jurisdiction in a suit brought to cancel a personal contract.*

There is nothing in these cases which at all conflicts with the views we have expressed as to the jurisdiction of the circuit court for the district of Michigan in appointing a guardian *ad litem* for a non-resident or absent infant, in a case which did not touch any property in the district, but was brought to cancel a personal contract.

There are, also, some cases in the state courts, in which a judgment upon a personal demand has been sustained against collateral attack, though rendered in an action where a guardian *ad litem* had been appointed without previous service of process upon the infant; but they are exceptional, and there has generally been in them some circumstance which rendered any disturbance of the judgment likely to lead to great hardship and injustice. Such is the case of *Bustard v. Gates and Wife*, 4 Dana (Ky.), 429. There an ejectment was brought for land more than twenty years after it had been sold, and which during the interval had greatly increased in value. But in none of the cases to which our attention has been called has a judgment been upheld where a guardian *ad litem* had been appointed for a non-resident infant against whom a purely personal demand was prosecuted. If such a case exists, the judgment in it can have no greater force than one rendered for a personal demand against a non-resident upon any other form of constructive service; and that constructive service will not give jurisdiction in such cases is the established doctrine of this court. *Pennoyer v. Neff*, 95 U. S., 714.

Judgment affirmed.

BALDWIN v. ROSIER.

(Circuit Court for Iowa: 1 McCrary, 884, 885. 1880.)

Opinion by McCraby, J.

STATEMENT OF FACTS.—This is a bill to foreclose a mortgage executed by the defendant Rosier, to the plaintiff, to secure a promissory note. The defendant Rosier seeks to avoid the contract sued on, by pleading his infancy at the time of its execution. The defendant Davis holds a subsequent lien on the premises mortgaged, and he joins with Rosier in his answer, and pleads the infancy of his co-defendant Rosier as a defense. To this answer, so far as Davis is concerned, the complainant excepts.

§ 898. *Infancy is a personal defense confined to the infant.*

The contract of an infant is not necessarily void, but only voidable, since the infant has an election to avoid it during his minority, and affirm it after reaching his majority.

The privilege of avoiding his acts or contracts, when they are voidable only, and not absolutely void, is personal to the infant, and one which no one can exercise for him except his heirs or legal representatives. A person, not a party to the contract, cannot take advantage of the infancy of the parties to it. It is a personal privilege. Schouler on Domestic Relations (2d ed.), 534, 535.

I am of the opinion that the defendant Davis cannot set up as a defense the infancy of the defendant Rosier. The exceptions to his answer are therefore sustained.

VASSE v. SMITH.

(6 Cranch, 226-233. 1810.)

Action against a supercargo, charging (1) breach of orders, and (2) in trover. Plea of infancy. The facts are stated in the opinion.

§ 899. *Infancy is a bar to an action against a supercargo for breach of instructions.*

Opinion by MARSHALL, C. J.

The first error, alleged in this record, consists in sustaining the plea of infancy to the first count in the declaration. This count states a contract between the plaintiff and defendant, by which the plaintiff committed seventy barrels of flour to the care of the defendant, to be carried to Norfolk and there sold for money, or on sixty days' credit payable in drafts on Alexandria, negotiable in the bank. The plaintiff then alleges that the defendant did not perform his duty in selling conformably to his instructions, but, by his negligence, permitted the flour to be wasted so that it was lost to the plaintiff. This case, as stated, is completely a case of contract, and exhibits no feature of such a tort as will charge an infant. There can be no doubt but that the court did right in sustaining the plea.

§ 900. *An infant is liable for conversion.*

The second count is in trover, and charges a conversion of the flour. That an infant is liable for a conversion is not contested. The circuit court was itself of that opinion, and therefore sustained the demurrer to this plea. But, in the progress of the cause, it appeared that the goods were not taken wrongfully by the defendant, but were committed to his care by the plaintiff, and that the conversion, if made, was made while they were in his custody under a contract. The court then permitted infancy to be given in evidence on the

plea of not guilty. To this opinion an exception was taken. If infancy was a bar to a suit of trover brought in such a case, the court can perceive no reason why it may not be given in evidence on this plea. If it may be given in evidence on *non assumpsit*, because the infant cannot contract, with at least as equal reason may it be given in evidence in an action of trover in a case in which he cannot convert.

§ 901. — *he is liable though the goods were delivered to him under contract.*

But this court is of opinion that infancy is no complete bar to an action of trover, although the goods converted be in his possession, in virtue of a previous contract. The conversion is still in its nature a tort; it is not an act of omission but of commission, and is within that class of offenses for which infancy cannot afford protection. Yet it may be given in evidence, for it may have some influence on the question whether the act complained of be really a conversion or not. The court, therefore, does not consider the admission of this testimony as error.

The defendant exhibited the letter of instructions under which he acted, which is in these words: "Sir," etc., but the plaintiff offered evidence that the flour was not sold in Norfolk, but was shipped by the defendant to the West Indies, for and on account of a certain Joseph Smith, as by the bill of lading which was produced. The defendant then gave his infancy in evidence, and prayed the court to instruct the jury that if they believed the testimony, he was not liable on the second count stated in the plaintiff's declaration, which instruction the court gave, and to this opinion an exception was taken. This instruction of the court must have been founded on the opinion that infancy is a bar to an action of trover for goods committed to the infant, under a contract, or that the fact proved did not amount to a conversion.

§ 902. — *whether there was a conversion in this case.*

This court has already stated its opinion to be, that an infant is chargeable with a conversion, although it be of goods which came lawfully to his possession. It remains to inquire whether this is so clearly shown not to be a conversion, as to justify the court in saying to the jury, the defendant was not liable in this action. The proof offered was, that the defendant shipped the goods on account of Joseph Smith. This fact, standing unconnected with any other, would unquestionably be testimony which, if not conclusive in favor of the plaintiff, was, at least, proper to be left to the jury. But it is urged that this statement refers to the bill of lading, from the notes in the margin of which it appears that, although the bill of lading, which was for a much larger quantity of flour, was made out in the name of Joseph Smith, yet, in point of fact, the shipment was made for various persons, and, among others, for the plaintiff. The court perceive, in this bill of exceptions, no evidence explanatory of the terms under which this shipment was made, and the marks in the margin of the bill of lading do not, in themselves, prove that the shipment was not made for the person in whose name the bill was filled up. It is possible that it may have been proved to the jury that this flour was really intended to be shipped on account of the plaintiff, and that the defendant did not mean to convert it to his own use. But the letter did not authorize him so to act. It was not, therefore, a complete discharge; and should it be admitted that an infant is not chargeable with a conversion made by mistake, this testimony ought still to have been left to the jury. The defendant would certainly be at liberty to prove that the shipment was in fact made for Vasse, and that he acquiesced in it so far as to consider the transaction not as a con

version; but without any of these circumstances which, if given in evidence, ought to have been left to the jury, the court has declared the action not sustainable.

This court is of opinion that the circuit court has erred in directing the jury that, upon the evidence given, the defendant was not liable under the second count; for which their judgment is to be reversed, and the cause remanded for further proceedings.

§ 903. *Contracts of Infants, etc.*—The power to enlist minors in the naval service is constitutionally delegated to the United States, and congress may authorize such enlistments even against the consent of parents. The enlistment of a minor in the navy in pursuance of the laws of the United States is a personal contract which binds the infant. He is liable, if he deserts, to the penalties of court-martial, and cannot be released on *habeas corpus*. *United States v. Bainbridge*,* 2 Wheeler, 521.

§ 904. Under the act of March 16, 1802, where a minor enlists without the consent of parent or guardian, his discharge under a writ of *habeas corpus* is proper. *In re Keeler*,* Hemp, 806. But see *In re McNulty*, 2 Low., 272.

§ 905. Minors may hold ministerial offices. *United States v. Bixby*, 9 Fed. R., 79.

§ 906. Powers of an infant to contract under seal. *Charles v. Matlock*, 8 Cr. C. C., 230.

§ 907. A written agreement executed by an infant beneficiary of a paid-up policy is voidable at the election of such infant. What constitutes an executed gift. *Brockhaus v. Kamna*, 7 Fed. R., 619.

§ 908. Indebtedness to infants is a consideration to sustain note and judgment to a third party in trust for them. *Bank of Georgia v. Higginbottom*, 9 Pet., 48.

§ 909. An infant cannot bind himself as an apprentice; nor can a master assign the indenture. Maryland statute construed. *Handy v. Brown*, 1 Cr. C. C., 610.

§ 910. An infant's promissory note being voidable and not void, infancy cannot be given in evidence on a plea that nothing was due. *Young v. Bell*, 1 Cr. C. C., 342.

§ 911. A minor who conveys land may disaffirm such act after coming of age by conveying to a third person; and such person is entitled to a decree quieting his title without refunding the consideration paid to the minor. *Nettleton v. Morrison*,* 5 Dill., 503; 23 Int. Rev. Rec., 187.

§ 912. The mortgage of a minor is voidable at his election upon coming of age. *In re Derby*, 6 Ben., 232.

§ 913. *Sale of infant's land.*—When and under what circumstances a sale by order of a probate court of Connecticut of a minor's land is valid. *Segee v. Thomas*, 3 Blatch., 21.

§ 914. The court should not decree a sale of infants' lands solely on the answer of their guardian *ad litem* that debtor's personal estate was insufficient to pay his debts. *Bank of United States v. Ritchie*, 8 Pet., 144.

§ 915. The step-father, as next friend of two infants, filed a petition in chancery in South Carolina asking a decree to confirm a sale of the infants' land there located. The step-father and infants resided in Maryland, and the petition set forth that the step-father was guardian. But in fact both infants had already attained the age at which guardianship ceased in Maryland, and both became *sui juris* before the decree was made. *Held*, that the court of chancery had no jurisdiction to make the decree. *Livingston v. Jordan*,* 10 Am. L. Reg. (N. S.), 53.

§ 916. A decree in chancery rendered against a woman who is shown by the bill to be both married and an infant will be reversed, where no appearance on her behalf was entered and no guardian *ad litem* appointed to protect her interest. And if the title was in a trustee for her use, the trustee should be made a party to the suit. *O'Hara v. McConnell*, 3 Otto, 150.

§ 917. *Suits by and against infants.*—Service of process upon infants of tender years. *Galpin v. Page*, 3 Saw., 93.

§ 918. In a suit against an infant notice should be served on a guardian *ad litem* appointed by the court. *Carrington v. Brents*, 1 McL., 174.

§ 919. A court of equity will not decree against infants without full proof, although their guardian *ad litem* has confessed the validity of the claim. *Walton v. Coulson*, 1 McL., 120.

§ 920. A minor is incapable of consenting to a change of forum in his case. *Kingsbury v. Kingsbury*, 3 Biss., 60.

§ 921. No guardian can voluntarily appear for a minor, but he must be served with process and thereby brought into court, and a guardian *ad litem* then and there appointed for him. *Fitch v. Cornell*, 1 Saw., 172.

§ 922. In all suits against infants, the duty of watching over their interests devolves upon the court in a considerable degree. *Bank of United States v. Ritchie*, 8 Pet., 123.

§ 923. No person has a right to intervene as a volunteer for an infant, and make a contract for the sale of the infant's estate; and a court of equity has no jurisdiction to affirm such a contract. *Livingston v. Jordan*, * Chase's Dec., 457.

§ 924. In a suit under the "abandoned or captured property act," children became of age pending proceedings, and one intermarried whose husband refused to join in the suit; *held*, that the children might all be joined as parties claimant in their own right. *Stanton v. United States*, * 4 Ct. Cl., 456.

§ 925. How infants may properly be made parties to legal proceedings. *Armstrong v. Wyandotte Bridge Co.*, McCahon, 170.

§ 926. In proving the execution of ancient deeds a court of equity is bound to protect the interests of minors and not permit in proof instruments executed by heirs under age. *Coulson v. Walton*, 9 Pet., 62.

§ 927. In a suit for wages prosecuted by the *prochein ami* of the minor, the misconduct of the *prochein ami* in fraud of the minor's rights is cause for judicial interference, especially if such misconduct is in collusion with the adverse party. *The Etina*, 1 Ware, 462.

§ 928. The rights of minors to sue in their own names for their wages. When the objection should be made. *The Melissa*, 1 Brown, 478.

§ 929. No judgment can be rendered against an infant so as to deprive him of his day in court after he comes of age. *Blount v. Darrach*, 4 Wash., 661.

§ 930. For a guardian *ad litem* to be appointed on motion of opposite counsel, without bringing infants into court or issuing a commission, is contrary to most approved practice. *Bank of United States v. Ritchie*, 8 Pet., 144.

§ 931. Ratification and disaffirmance.—Ratification of a contract made during infancy. *Teakle v. Bailey*, 2 Marsh., 44.

§ 932. Infants allowed one year after obtaining their majority to redeem land sold for taxes. *Mockbee v. Upperman*, 5 Cr. C. C., 536.

§ 933. A disadvantageous contract as to property was made for an infant brother by sisters who had recently attained majority, with an agent who had been employed for them during their infancy in such transactions as had given him full and special knowledge of the value of the property, which knowledge he concealed from them and which they did not otherwise acquire. The infant on attaining majority repudiated the contract. *Held*, under the circumstances shown, that the contract ought not to stand against the sisters. *Teakle v. Bailey*, 2 Marsh., 43.

§ 934. Torts of infants.—Disability of infancy unavailable, when. *O'Laughlin v. Union Central Life Ins. Co.*, * 8 McC., 548.

§ 935. Infancy no defense in case of fraud. *Catts v. Phalen*, * 2 How., 383 (ACTIONS, §§ 107-109).

§ 936. In an action for the recovery of money fraudulently had and received, infancy is no defense if the fraud was consummated or money received after majority. *Ibid*.

Devise to infants, see § 553.

As to married woman who is also an infant, see §§ 112-114.

V. MASTER AND SERVANT.

[See *TORTS*.]

§ 937. General rights, hiring, etc.—Specific service, with stripes for disobedience, is not a remedy to invoke in this country; but damages may be recovered against one who entices away one's servant. *Milburne v. Byrne*, 1 Cr. C. C., 289.

§ 938. Rights of master and servant stated, in a case where A. contracts to serve B. as superintendent and as a cutter and fitter in a dressmaking establishment for one year, payable in monthly instalments, besides board and traveling expenses, and B. dismisses her from service at the end of three months on the alleged ground of incompetency. Question of skill in the employment undertaken considered. *Leatherberry v. Odell*, * 7 Fed. R., 641.

§ 939. Where the servant is discharged without sufficient cause, the amount receivable had the contract been fulfilled is *prima facie* the measure of damages. But in mitigation of damages it may be shown that the discharged servant received other similar employment, or might have received it by proper efforts. *Ibid*.

§ 940. If a servant, employed for a year on a stated salary payable monthly, absents himself for twelve days, on account of the sickness of a child, but without giving notice to the master or obtaining leave, the latter may refuse to receive him back into the service. *Fowler v. Great Falls Ice Co.*, * 1 MacArth., 14.

§ 941. When an employee has become wholly unfit to perform the duties which he engaged to perform, the employer may terminate the engagement even without giving the stipulated notice. *Lyon v. Pollard*, 20 Wall., 403 (CONTRACTS, §§ 1600-10).

§ 942. Hiring at monthly wages *per se* imports that the engagement is by the month, leaving it optional with either party to terminate the obligation at the end of the month. If the service is closed by the master while the month runs, the master must pay for the month; and if by the servant, he loses the accruing wages. *The Steamboat Hudson, Olc.*, 396.

§ 943. Relation of master to third persons.—Responsibility of a master for criminal acts and omissions of his servant. *United States v. Buchanan*, 9 Fed. R., 692.

§ 944. Master is not chargeable with acts of his servant unless the latter acts within the scope of authority given him by his master. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 48 (CARRIERS, §§ 63-88).

§ 945. Though the servant of a railway corporation, in the course of his employment, should disobey an express order of his employers so as to cause a collision, the employers are liable for the resulting injuries to passengers. *Philadelphia & Reading R. Co. v. Derby*, 14 How., 468.

§ 946. Where a railroad company employed contractors, and, after dismissing them from their obligations, left the work in so dangerous a condition as to create a nuisance, it was held liable for resulting injuries. *Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 28 How., 209.

§ 947. The liability of a person or corporation employing a contractor to construct a public work is not limited, as formerly, to the instance of employing an unskilful and improper contractor. But if, while a third party uses reasonable care, he is injured because of negligent or improper or unlawful prosecution of the work, in the ordinary doing of which a nuisance necessarily occurs, the employing person or corporation is liable. *Chicago City v. Robbins*, 2 Black, 418; *Ware v. St. Paul Water Co.*, 2 Abb., 261; 1 Dill., 460.

§ 948. In such case the employing person or corporation has a remedy over against the party who has produced the injury, unless concurring in the wrong. *Chicago City v. Robbins*, 2 Black, 418.

§ 949. When an injury has been sustained by the negligent manner in which a wharf or other work is constructed or protected, the master is liable for the acts and negligence of the servant in the course of the employment, although he did not authorize or know of the acts complained of. When the wrong-doer ceases to be a servant and is himself the master, he alone is responsible. *Railroad Co. v. Hanning*, 15 Wall., 649.

§ 950. Both the master who commands and the servant who commits an act of trespass may be sued—either jointly or severally. *Lightner v. Brooks*, 2 Cliff., 287.

§ 951. Injury to servant by fellow-servant.—Where an administrator sues for injuries caused to the intestate by reason of injury caused while he was going ashore, after having been employed to help load a steamboat, through the carelessness of the boat hands in pulling the gang-plank, the court may leave the jury to consider whether upon the facts the intestate's relationship of servant had ceased. *Packet Co. v. McCue*, 17 Wall., 506. See TORTS.

§ 952. The rule that the master is not liable to a servant for the injuries of a fellow-servant, although the servant injured was under the control of the servant causing the injury, has no application where the person injured is a boy of tender years, employed under the superintendence of a full grown man, who requires him to perform an act exposing him to injury, which was outside his proper service, and of whose hazards he could not fairly judge. *Railroad Co. v. Fort*, 17 Wall., 558.

§ 953. Miscellaneous points.—In an action of assault and battery for beating the plaintiff's servant *per quod*, loss of service is the gist of the action and should be shown in evidence. *Voss v. Howard*, 1 Cr. C. C., 251.

§ 954. Forwarding money by an intelligent, honest and trustworthy youth of seventeen is not a careless mode of conveyance. *Pelham v. Pace*, Hemp., 228.

As to apprentice's indentures, see 900. And as to child's service to a parent, see PARENT AND CHILD, *ante*.

DOMICILE.*

[Commercial Domicile in time of War, see WAR. As to questions of Citizenship, see CITIZENSHIP AND ALIENS; CONSTITUTION AND LAWS, VI, VII, IX. Citizenship for purposes of Jurisdiction, see COURTS, V, 2, a.]

SUMMARY.—*Defined*, § 1.—*How changed and acquired*, §§ 2-4.—*Intention; effect of*, §§ 2-4; *how shown*, § 5; *presumption of*, § 9; *declarations, effect of*, §§ 5-8; *as evidence*, §§ 5-8.—*Domicile of succession*, § 10.—*Of origin*, § 11.—*Of wife*, §§ 12, 13.—*Change of; burden of proof*, § 14.—*Election of*, § 15.—*Mixed question of law and fact*, § 16.

§ 1. The domicile of a person is his home. It is the place where he resides with the intention of remaining and without intent to absent himself therefrom other than for temporary

purposes. Neither allegiance nor the exercise of political rights constitutes any part of the definition of domicile, and either is important only as bearing on the question of intention. *White v. Brown*, §§ 17-26. See §§ 41-43, 115.

§ 2. A new domicile is acquired when there is a change of residence with intention to acquire a new home. The shortest residence with such intention is sufficient, but long continued residence without it is insufficient. *Ibid.*; *Burnham v. Rangeley*, §§ 30-33. See §§ 42-49, 56-70.

§ 3. If residence and such intention concur, the place of removal becomes at once the place of domicile, notwithstanding a floating intention to return at some future period. *Doyle v. Clark*, §§ 27-29. See § 41.

§ 4. Where a person removes from one place to another with intent to make the latter his place of permanent abode, his domicile is immediately changed, even though he has temporarily left his wife and a portion of his family in the former house, which he continues to own. *Burnham v. Rangeley*, §§ 30-33.

§ 5. A person's intention to acquire a new domicile is to be gathered from his acts and accompanying declarations. *Ibid.* See §§ 75, 76.

§ 6. Declarations accompanying acts, and made *ante litem motam*, are admissible as part of the *res gestæ* to show an intention to change a domicile. *Ibid.* See §§ 89-91.

§ 7. A declaration of intention made *post litem motam* will not operate to effect a change of domicile. *Doyle v. Clark*, §§ 27-29.

§ 8. To speak of a place as home will amount to nothing in the absence of acts showing an intention to return; but long-continued residence and concurring acts and declarations must be taken as conclusive. *Pennsylvania v. Ravenel*, §§ 39, 40.

§ 9. Long-continued residence is presumed to be in consequence of an intention to acquire a domicile at the place of residence. *White v. Brown*, §§ 17-26. See §§ 92, 95, 96.

§ 10. For the purposes of succession a person can have but one domicile. *Ibid.*

§ 11. The domicile of origin is the place of birth. It continues until a new domicile has been intentionally and actually acquired. It easily reverts, but the acquired domicile must be abandoned before there can be such a reversion. *Ibid.* See §§ 73-86, 101.

§ 12. The wife's domicile follows that of her husband. *Burnham v. Rangeley*, §§ 30-33. See §§ 107-110.

§ 13. A man's domicile at the time of his death fixes that of his wife at that time. *Pennsylvania v. Ravenel*, §§ 39, 40.

§ 14. When an existing domicile is shown, the burden of proof to show a change is on the party asserting it. *White v. Brown*, § 23; *Burnham v. Rangeley*, §§ 30-33. See § 71.

§ 15. When a person has two residences, leaving the question of domicile in doubt, he may select and treat either as his domicile. *Ibid.*

§ 16. The question of domicile is a mixed question of law and fact. The court instructs the jury what constitutes a domicile, and the jury are to apply those principles to the facts as found by them. The court may properly instruct them that if they find certain evidence to be true, then, there was a change of domicile. *Pennsylvania v. Ravenel*, §§ 39, 40. But see § 77.

[NOTES.—See §§ 41-115.]

WHITE v. BROWN

(Circuit Court for Pennsylvania: 1 Wallace, Jr., 217-268. 1848.)

STATEMENT OF FACTS.—This was a feigned issue to determine the question of the domicile of Mathias Aspden, the descent of his property depending on the question of his domicile. He was born in Philadelphia, in 1748, and resided there, with the exception of a short time when in school in England, till the breaking out of the American Revolution, when, siding with the king, he went to England. In 1781 his real estate in Pennsylvania was confiscated. In 1783 he applied unsuccessfully to the British government for compensation, and in 1785 returned to Philadelphia to procure a restitution of his property, but left very soon on account of unreasonable fears for his personal safety. He went to England, where he remained, and in 1791 returned to Philadelphia. Here he made a will, appointing three American executors, and remained about eight months, when he again went to England. With the exception of a visit to the continent, he remained in England till 1815, when

he again came to Philadelphia. He remained in the United States twenty-two months, and returned to England, where he died in 1824. From 1783 on he made applications for compensation to the English and American governments alternately, and in memoirs and memorials prepared and presented for that purpose, and other documents, writings and letters, made many contradictory statements as to his residence, intentions, allegiance and citizenship. He received partial compensation in England, and he was pardoned in this country, but his property was not restored.

§ 17. *Definitions of domicile.*

Charge by GRIER, J.

Domicile is a word which we have adopted from the Roman or civil law, but which it has been considered so difficult to define with precision and accuracy, that an eminent writer (Bynkershook) on the subject was unwilling to hazard a definition, and therein has been commended by a learned English judge (Lord Alvanley, 5 Ves., 750) for his wisdom.

The Roman codes described domicile as follows: "In whatever place an individual has set up his household gods and made the chief seat of his affairs and interests; *from* which, without some special avocation, he has no intention of departing; *from* which when he has departed he is considered to be from home; and *to* which, when he has returned, he is considered to have returned home. In this place there is no doubt whatever he has his domicile." Quoted in Phillimore on Domicile, 11.

It would tend rather to confuse than to elucidate the subject, to notice the many other attempts at definition of this word, and to attempt to point out their several merits or defects. It may be correctly said, however, that no one word is more nearly synonymous with the word domicile than our word "home." The definition given by the late Judge Rush of this city (*Guier v. O'Daniel*, 1 Binn., 349, n.), which has received the approbation of an English writer (Phillimore) on this subject, combines, it is probable, accuracy with brevity beyond any other. He defines it "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain for an unlimited time."

Two things, says Judge Story (*Conflict of Laws*, § 44), must concur to constitute domicile. *First*. Residence. *Secondly*. The intention of making it the home of the party. There must be the fact and the intent, and in many cases actual residence is not indispensable to retain a domicile after it is acquired, but it is retained *animo solo*, by the mere intention not to change it, or adopt another. If, therefore, a person leave his home for temporary purposes, but with an intention to return to it, this change of place is not, in law, a change of domicile.

There are few subjects presented to courts for their decision which are surrounded with so many practical difficulties as questions of domicile. The residence is often of an equivocal nature; the intention extremely obscure, and has to be gathered from acts and declarations oftentimes conflicting and contradictory. It is probable, however, that there is not a case to be found in all the books which presents more difficulties arising from this cause than the one before us. The testimony fills an octavo volume of nearly nine hundred pages. You have the whole history of the life of Mathias Aspden, all that he did, much that he said, and much more that he has written. Indeed, it would seem that, being a man of much leisure, he had spent a great part of his life in writing documents which bear — some indirectly and many di-

rectly—upon the very question which you are called on to decide. And with an obliquity of genius rarely exceeded, he has enveloped it in so much contradiction and confusion and obscurity that it will require your utmost attention and the vigorous exercise of all your powers to solve the question.

§ 18. *Kinds of domicile — of origin; of choice.*

On the first point submitted to you there is no doubt. The *domicile of origin* of Mr. Aspden was Philadelphia, in the then British province of North America.

The next question will be: Did the testator ever change this domicile and acquire another;—a domicile of choice as distinguished from his domicile of origin? And this is the great question in the case.

§ 19. *A person can have but one domicile of succession.*

In the consideration of it the following rules must be observed:

1. That although a man may have two domiciles for some purposes, he can have *one* only for the purpose of succession.

§ 20. *Until a domicile of choice is fully acquired the domicile of origin is in force.*

2. That the original domicile, or *forum originis*, as it is called, is to prevail until the party has not only acquired another, but has manifested *and carried into execution* an intention of abandoning his former domicile, and taking another as his sole domicile. A man cannot be considered as a vagabond, or a person without any domicile; for the domicile of origin is not abandoned until a new one has been *intentionally and actually* acquired.

§ 21. *Residence and intention make the domicile of choice.*

3. That in order to acquire a domicile of choice, the fact of residence must be coupled with the intention to abide an indefinite time, or make the place his home. But the shortest residence with such an intention is sufficient. A residence in one place for a great number of years is a violent and continuing proof of the *animus manendi*; yet, if it clearly otherwise appear that such residence was without such intention, it would be of itself insufficient to constitute such domicile.

§ 22. *Burden of proof as to change.*

4. That the burden of proof lies on him who asserts a change of domicile.

§ 23. *The domicile of origin easily reverts.*

5. That the domicile of origin *easily reverts*, and that it requires fewer circumstances to constitute domicile in a native subject or citizen than to impress the national character on one who is originally of another character. The acquired domicile, however, must be finally abandoned before the domicile of origin can revert.

§ 24. *A fugitive does not lose his domicile.*

6. A fugitive from his country on account of civil war still retains his domicile, unless he shows an intention of a total abandonment of his country by the acquisition of a new domicile of choice. Nor will the confiscation of his property by the new government, in the case of a revolution effected after civil conflict—nor the attainder of his person—of themselves, put an end to his domicile of origin. If he elect to adhere to the old sovereign or government, looking forward with hopes of its re-establishment, his domicile of origin is not necessarily abandoned by such election.

§ 25. *Neither allegiance nor the exercise of political rights controls the question of domicile, otherwise than as bearing on question of intention.*

Allegiance to the existing government, or the exercise of political rights,

constitutes no part of the definition of domicile. These facts may nevertheless be of great importance in judging of the intention. Consequently, adherence to the king of Great Britain in our revolutionary war, although it might have caused the forfeiture of the life or property of an American citizen, was not, of itself, an abandonment of his domicile. The estates of those persons who fled from England with the Stuarts and died in France were administered by the French courts according to the law of England as their domicile.

§ 26. *Intention to fix domicile presumed to correspond with long continued residence.*

Keeping in view these principles, you will inquire whether Mr. Aspden ever acquired a new domicile of choice. It is admitted that he left Philadelphia, his domicile of origin, in 1776, and went to England, where — with the exception of two or three years spent in the United States and in journeys on the continent of Europe for health or amusement — he lived until his death in 1824. The actual habitation being thus clear, the question then depends on *intention*. Did he go to England with the intention of making it his home? If not, did he at any time while there change his intention so that the *animus manendi* concurred with the act of habitation, so as to constitute a change of domicile? The leading fact that he spent the greater part of his life in England, and died there, raises a violent presumption that his intention corresponded with his acts. But as I have before said, in questions of succession even forty-eight years spent in a foreign country may possibly be accounted for, and the inference drawn from length of time rebutted.

Without expressing any opinion on Mr. Aspden's intention, I may say that the testimony is full of contradictions; and would afford clear ground for a verdict either way, if the testimony on the opposite side be left out of view. As it is, the question is susceptible of much doubt. Previous to the testator's return to England in 1785, there is no sufficient evidence, I think, of an intention to make England his home. Between 1785 and 1791, when he returned a second time to Philadelphia, there are declarations both ways. How far, on the one side, they may be accounted for as made by the suggestion of Mr. Douglass and Mr. Galloway, his counsel in England, to gain a certain end there; or how far, on the other, they may have been prompted by a hope of obtaining a return of his property here, you will judge for yourselves. After he obtained his pardon here and compensation in England, his heart appears to have been set on getting his attainder reversed and his property here restored; and the hope, it appears, never forsook him. Did it tend to keep the *animus revertendi* always alive in his breast? Does his reporting himself as an "alien" in England, and his styling himself "The Right Honorable Matthias Aspden, of Philadelphia," show that he considered himself an American? Or were such designations resorted to only for the purpose of evading a tax on his dividends in England?

In fine, without wishing to express any opinion on the merits of the question, I may remark that the biography of the testator exhibits him as a man who led an unhappy and discontented life. Love of money his ruling passion, without ties of family or friendship, he fled to England to save his personal property from confiscation, and thereby lost his real property here. Notwithstanding his political principles made him prefer his English allegiance in the war of the Revolution, and though he was extremely vexed by the treatment which he had received from our legislature, he still retained a strong attachment for his native land. When in England, he was absent from the associ-

ations and companions of his youth, and ever planning his return. When he returns he finds everything changed. The friends of his youth have been removed by death. New men have grown up and are at the head of affairs. Everything has been moving forward, while he alone has stood still. He fails to meet the respect and attention to which he fancies that his wealth entitles him. He becomes sour and discontented, and returns to England to inflict on chancellors and parliaments the endless memorials which he had lately found ineffectual on legislatures and congresses. Time, instead of assuaging the sense of his grievances, seems only to add to their weight and number; his hopes of remuneration from republican honor or royal generosity become at last a monomania; he spends his time in writing memoirs and memorials, contradictory and unintelligible, to annoy his contemporaries and puzzle posterity, and indites a will in a few lines whose meaning, after twenty years of litigation, yet remains to be settled. A wandering hypochondriac in search of health, he spends his time in vibrating between two continents, is occupied throughout his life in accumulating wealth for unknown heirs, and finally dies without a friend to soothe his pillow or follow him to the grave! Whether he died an Englishman or an American it is for you, gentlemen, to decide. (Verdict in favor of American domicile.)

DOYLE v. CLARK.

(Circuit Court for Michigan: 1 Flippin, 586-542. 1876.)

STATEMENT OF FACTS.—Plaintiff, a citizen of Illinois, brought suit in a state court in Detroit. The cause was removed to the United States circuit court, and upon the trial a nonsuit was taken by the plaintiff, who, two days afterwards, brought suit again in the state court. This suit was also removed by defendant, and a motion to remand was made on the ground that plaintiff was a citizen of Michigan.

§ 27. *Citizenship of any particular state depends upon residence.*

Opinion by BROWN, J.

If plaintiff be a citizen of the United States, and in absence of proof to the contrary I must presume such to be the fact, her citizenship of any particular state depends solely upon her residence within such state. The constitution, investing jurisdiction in the federal courts over controversies between citizens of different states, is to be interpreted as if the word "resident" were used instead of "citizen," though when used in contradistinction to the word "alien," it signifies that class of persons who by nativity or naturalization have obtained the right to the protection of the general government and to the prerogatives and immunities attached thereto. *Cooper v. Galbraith*, 3 Wash., 546; *Read v. Bertrand*, 4 id., 514; *Butler v. Farnsworth*, 4 id., 101 (COVERS §§ 1044-45); *Gardner v. Sharp*, 4 id., 614.

§ 28. *What is necessary to effect a change of domicile.*

Two things must concur to effectuate a change of domicile. 1st. An actual change or removal of residence. 2d. An intention to make such change or removal permanent. If both of these requisites concur in point of time, the place to which removal is made becomes instantly the place of domicile, notwithstanding the party may entertain a floating intention to return at some future period. Story on Conflict of Laws, § 46. This is illustrated in the ordinary case of an emigrant who transports his family and household effects to a new state and settles upon a farm. A change of domicile takes place instantly

upon his arrival. On the other hand, a person may transport his family and household effects in like manner to another state for a temporary purpose, as for instance the settlement of some particular business or for a change of climate in summer, without thereby disturbing his former residence. The leading English case on this question is that of *Somerville v. Somerville*, 5 Ves., 750, and the principles there laid down have been since so often reaffirmed as to have become the unquestioned law of both countries. From a very large number of American cases I cite the following as the best illustrations of the general doctrine: *State v. Hallet*, 8 Ala., 159; *Ringgold v. Bailey*, 5 Md., 186; *Smith v. Croom*, 7 Fla., 81; *McKowen v. McGuire*, 15 La., 637; *Leach v. Pillsbury*, 15 N. H., 137; *Johnson v. 21 Bales, etc.*, 2 Paine, 602; *Jennison v. Hapgood*, 10 Pick., 98; *Williams v. Whiting*, 11 Mass., 423.

While, as before observed, the general rule applicable to a change of domicile is unquestioned, much difficulty is experienced in applying it to a given state of facts. In the case under consideration, it appears with sufficient certainty that plaintiff, prior to her coming here to attend the trial of her cause, was a citizen of Illinois, and that she is now a citizen of Michigan, and the only point to be determined is, when this change of citizenship took place. Her deposition is loose and contradictory, and there is an evident desire on her part to make it appear that she was a resident of this state at the time this second suit was commenced. She states, in substance, "that she has resided in Michigan since her trial here, June 24th; that this has been her permanent residence since then; that Michigan has been her home off and on these last two years; that she had no home, and lived in Chicago up to July last; last July her house was sold." That she was here on the day of the trial of her case, and told Mr. Atkinson that she would become a citizen. She also told him three months before, and asked him whether there was any oath necessary or anything else required; that she asked him that in this court-room, and told him it was her intention to become a citizen; that immediately after that she resided at St. Mary's Hospital for three days, and then, in response to a telegram from her brother, returned to Chicago to nurse him, came back after three weeks, stopped at the Biddle House a week, and then at the Alexander House, at Grosse Isle, three or four weeks, and then at a farmer's; thence she went to St. Mary's Hospital, and has since remained there, though it appears she went to Mt. Clemens and remained some time, taking care of her brother. She concludes her direct examination by saying that from the date of the trial she became a citizen of this state. It appears that she came to this city two weeks before the trial, because, as she said, she had no home anywhere else, and the climate agreed with her better than Chicago.

§ 29. *Effect of declarations of intention. Admissibility of such declarations.*

Her counsel testifies in an affidavit that she has continuously claimed Detroit as her home since this suit was commenced, and removed here on purpose to prevent the removal of this case to this court, where it was once tried, and a nonsuit suffered.

I have no doubt the truth is substantially this: that plaintiff came here with no intention of changing her residence, but to attend the trial of the case; that disappointed at the result of her trial, and desiring to commence a new suit in the superior court, she announced her intention of becoming a resident of this state, and did finally remove here. Disembarrassed of her declaration to her counsel, made at the time of the nonsuit in this court-room, that she

intended to become a citizen of this state, the question would present no difficulty. It is the ordinary case of a person coming from abroad to attend the trial of a suit in which she is interested, and subsequently made this state her residence. Did then her declaration to her counsel, that she intended to change her residence and become a citizen of this state, operate to effectuate such change? The general rule is well understood, that declarations which are a part of the *res gestæ* are admissible in evidence to show intention, and the instances are numerous where the declarations of a person made in changing a residence have been received as evidence of an intention to make the change permanent, and to rebut any presumption that it was made for temporary purposes. At the same time the admissibility of such declarations is somewhat in the discretion of the court and is subject to another general rule, that a person will not be allowed by his declarations to make a case for himself. In matters of general and public interest, in which evidence of reputation or common fame is admitted, the declarations of persons supposed to be dead are held admissible only if made before any controversy arose touching the matter to which they relate, or, as it is usually expressed, *ante litem motam*. 1 Greenl. Ev., secs. 130, 131.

Declarations which are claimed to be part of the *res gestæ* are apparently subject to a similar qualification. The principle is illustrated in the case of *Thorndyke v. City of Boston*, 1 Met., 247, where the question arose upon the admission of letters, offered on the ground that they were declarations of the plaintiff accompanied with his acts of removal from Boston to Edinburgh, addressed to his agent in the ordinary course of business, and were, therefore, as *res gestæ*, good evidence of his intention connected with those acts. The case turned upon the question whether the plaintiff was liable to taxation as an inhabitant of Boston in 1837, and the court held that letters written before the plaintiff knew the tax had been assessed upon him were admissible, but it was strongly inclined to the opinion that letters written after the suit was brought were not so. The court observe: "The admission of declarations either written or verbal in connection with acts done, and giving character to such acts, depends much on circumstances and upon the nearness or distance of time to the declarations made and the acts done."

In the case of *Watson v. Simpson*, 13 La. Ann., 337, conversations with a party, where he had an opportunity to manufacture evidence for the purpose of establishing a fictitious domicile, were held not to affect the real facts of the case. So, also, in *Tobin v. Walkinshaw*, 1 McAl., 186 (CITIZENS, §§ 34-36), a distinction is taken between declarations as to residence made before and after a controversy arose on the question as to residence became material.

Now, in the case under consideration, the declarations in question not only did not accompany the act of removal, being made some two weeks after she arrived here, but were evidently made with the design thereby of establishing a new domicile, or, in other words, of making a case for herself. There had been no change of residence. She retained her house in Chicago, and there is nothing tending to show that she came here with anything more than her ordinary clothing. It is true that she is poor, and there is nothing to show that she has now brought her furniture with her; but it does not appear that in July she sold and abandoned her house in Chicago, and that since that time she has remained in this state. There had been, it is true, a change of presence, but nothing to indicate a change of residence.

This case bears some resemblance to that of *Williams v. Whiting*, 11 Mass.,

423, where the question arose as to the residence of an elector on the 2d of November, 1871. It appeared that, on the 28th of October, he resided in Roxbury, being a householder and having a family there. Previous to this time he had been appointed and qualified as clerk of the court in the county of Norfolk, and, on the 28th of October, came to Dedham for the purpose of performing the duties of his office, took possession of the apartments in the court-house, but his family and household establishment remained in Roxbury until the 12th of November, when he removed them to Dedham. From the 28th of October until the 12th of November he boarded at a public house in Dedham. On the 29th of October he contracted for a house in Dedham, which he was to rent and occupy from the 12th of November. On November 1st he returned to his family in Roxbury at night. The court were of opinion, under the circumstances, he remained an inhabitant of Roxbury until the day of his removal with his family. A still stronger case is that of *State v. Hallet*, 8 Ala., 159. In this case a resident of Georgia came to Alabama for the purpose of settling, leased land and purchased materials for the erection of a foundry, and returned to Georgia for his family, and, after some detention, returned with his family and took up his residence in Alabama. The court held that he did not lose his domicile in Georgia or acquire one in Alabama until his actual removal with the intention of remaining. The court remark that his acts in coming to Alabama with the design of settling, and manifesting his intention of making that state his permanent residence by leasing a piece of land, procuring materials for the erection of a foundry, mark unequivocally his intention of changing his residence, but were not sufficient to cause a loss of the domicile he previously had. If, say the court, on his return to Georgia he had, before being able to carry his purpose into effect, died, it can admit of no doubt the courts of Georgia and not of this state would have been entitled to distribute his estate. The same rule must have prevailed if he had died upon the journey here, for until he had actually reached here there would have been no change in fact of the domicile. See, also, *McIntyre v. Chappell*, 4 Tex., 187; 4 Cow., 516.

Putting the illustration used in the Alabama case, it seems to me there can be no doubt that if the plaintiff had died after she had returned to Chicago the day following the commencement of this suit, her estate would have been administered there and not here. I am satisfied she was not a citizen of this state at the time this suit was commenced, and the motion to remand must be denied.

BURNHAM v. RANGELEY.

(Circuit Court for Maine: 1 Woodbury & Minot, 7-12. 1845.)

STATEMENT OF FACTS.—Complainants, describing themselves as citizens of New Hampshire, filed a bill in equity against the respondent, alleging that he was a citizen of Maine. The respondent denied citizenship in Maine, and alleged that he was a citizen of Virginia.

§ 30. *Test of jurisdiction.*

Opinion by WOODBURY, J.

The question presented here affects the jurisdiction of this court over the bill. By the act of congress passed September 24, 1789, chapter 20, section 11, jurisdiction is not given to us in this case unless "the suit is between a citizen of the state where the suit is brought and a citizen of another state." 1 Stats. at Large, 78. Neither of the parties, when the writ was sued out or

since, is pretended to have belonged to the state of Maine, *where the suit is brought*, unless it be the respondent. The issue is whether he, at that time, viz., September 26, 1843, was a citizen of the state of Maine. If he was, further proceedings under the bill can be sustained; but if he was not, our authority to sustain them fails, and the bill must be dismissed for want of jurisdiction.

§ 31. — *facts bearing on the question of citizenship.*

The facts seem to be clear, from the evidence in the case, that the respondent, prior to 1842, had been a citizen of the state of Maine for several years. He appears to have had no near relatives in this country except a wife and two daughters, who resided with him in Maine, and two sons, who were settled in Virginia.

He appears also to have owned land in the latter state, and to have considered the climate as more favorable to his health than that of Maine. Under these circumstances, in July, 1842, he went to Virginia for the purpose of erecting buildings on his land there with a view to a permanent residence in that state; but upon his arrival, finding another tract with buildings already erected thereon situated near his sons, he purchased the same, and returned to Maine to adjust his affairs and remove his family.

In October, 1842, he sent to Virginia a part of his household furniture, took with him one of his daughters, and removed to the plantation he had there bought; and did this with the avowed view of making it his permanent home. He proceeded to repair the buildings, and make large additions to them, so as better to accommodate all his family; commenced improvements on his land by ploughing, fencing and planting fruit trees; purchased more furniture and tools, stock and laborers; and proposed to send for his wife and other daughter in Maine in the spring of 1843. But as the wife was unwilling to go, except with him personally, and he had not leisure conveniently to return for her till September, 1843, he then came to Maine, sold the residue of his furniture there September 28, 1843, and the next day took passage for Virginia with his wife and other daughter.

§ 32. *Declarations accompanying acts are admissible to show intention to change domicile.*

Some of these intentions were proved by his own declarations, accompanying a part of the acts before named, and made previous to any service of the subpoena in this case. Though objected to as not competent evidence, we are satisfied that under such circumstances they must be regarded as a part of the *res gestæ*, and clearly admissible in explanation of acts showing the object in view in the latter, and thus affecting the question of domicile. See *Stansbury v. Arkwright*, 5 Carr. & P., 575; *Thorndike v. Boston*, 1 Met., 242, 247; *Kilburn v. Bennett*, 3 id., 199; *Marsh v. Meager*, 1 Stark. N. P., 353; 1 Greenl. Ev., 108; *Newman v. Stretch*, 1 Moody & M., 338; *Harvard College v. Gore*, 5 Pick., 370, 374, *semble contra*; *Butler v. Farnsworth*, 4 Wash., 103 (Cours., §§ 1044-45). The domicile is to be changed by acts and intents united. The *Venus*, 8 Cr., 253, 278; *Vattel's Law of Nat.*, 92; 5 Greenl., 145; *Bruce v. Bruce*, 2 Bos. & Pul., 229, note.

Not, I admit, by merely declaring intentions alone. But here are both declarations and acts, and both co-operating and in most respects consistent. The whole question of domicile is usually dependent on the intent of the party, though that is to be collected or inferred from acts as well as declarations. The acts are chiefly important as showing the intent.

§ 33. *Facts held to constitute a change of domicile.*

It is manifest, then, from competent evidence that the respondent as early as October had good reasons for changing his residence from the state of Maine to Virginia; that he had come to the determination to change it *bona fide* and permanently, and that under that determination he then removed a portion of his family and furniture to the latter state; and has continued to reside there since on his plantation, making valuable improvements, showing *animum manendi* in various ways; and neither by acts nor words evincing *animum revertendi* or any intent to return to Maine to reside, except the remaining of his wife and one daughter behind him in the state of Maine, occupying a house of his not sold till January, 1843, and using some of his furniture there. This, unexplained, would conflict with and impair the force of the other circumstances; but it is clearly shown that those persons were left behind only till further repairs were made to the house in Virginia—and these last being completed, they were to join him in the ensuing spring; and that being unwilling to go except in his company, they did not leave Maine till he came for them in September, 1843.

He then returned to this state, it is true, but not with a view of resuming his residence in Maine. It was directly the reverse. Nor did he return on account of his not having terminated that residence the previous year, but because he had terminated it, and wished to remove to his new domicile those to whom it was not convenient or agreeable to join him there earlier. Leaving one's family behind, and especially only a part of them, does not, under such circumstances, however different it might be under others, prevent the domicile from being changed. *Cambridge v. Charlestown*, 13 Mass., 501. So a temporary return to one's family at a former place of residence, with views and for objects merely temporary, does not revive a former citizenship. *The Friendschaft*, 3 Wheat., 14; S. C., 4 Cond. R., 109. It does not, even if the party resides there during winter with his family and dies there. *Harvard College v. Gore*, 5 Pick., 370, 374.

§ 34. *Wife's domicile is that of her husband.*

It is a general rule, likewise, that the wife follows the settlement and citizenship of the husband. *Story's Conflict of Laws*, § 46. Her residence is also in subordination to his; though, as before intimated, having an influence on his at times, if different, and if the cause of the difference is not explained consistently with his permanent removal elsewhere. 7 Greenl., 501, App. But here it is explained, and is not at all inconsistent with the position of his having changed his abode permanently.

§ 35. *He who alleges a change of domicile must prove it.*

Again, it is conceded to be a sound principle, that being once a citizen of Maine, the burden of proof is on the respondent to show a change in his domicile. *Kilburn v. Bennett*, 3 Met., 199, 201. But this he has attempted, and satisfactorily.

§ 36. *A person with two residences may select either as his domicile in case of doubt.*

Again, if the respondent was regarded in September, 1843, as having two places of abode, leaving it in some degree doubtful which was intended as the permanent one, he is at liberty to select and treat either as his domicile, as he has in this case treated Virginia. *Story's Conflict of Laws*, § 46; 5 Ves., 750, 788; 5 Pick., 370.

§ 37. *Domicile, how and when changed.*

There seems, then, to be no other objection to the application of the following well settled principles to the facts in this case: *First.* That where a person removes from one place to another, with the intent to make the latter his permanent abode, his domicile is to be regarded as immediately changed. The *Venus*, 8 Cr., 278; *United States v. The Penelope*, 2 Pet. Adm., 450; *Story's Conflict of Laws*, § 46; *The Ann Green*, 1 Gall., 285; 3 Rob., 12; 5 Rob., 60, 233. Justice Story said in *The Ann Green*, 1 Gall., 285, "Even the shortest residence, if with the design of a permanent settlement, stamps the party with a national character." That was a new residence after a removal. *Second.* Such a change at once affects the jurisdiction of the United States courts. *Case v. Clarke*, 5 Mason, 70 (COURTS, § 1048); *Gassies v. Ballou*, 6 Pet., 761 (COURTS, § 1090); *Cooper v. Galbraith*, 3 Wash., 546; *Catlett v. Pacific Ins. Co.*, 1 Paine, 594.

§ 38. *The acquirement of citizenship on a change of residence does not, so far as the jurisdiction of the federal courts is concerned, depend on the acquirement of political rights.*

The person altering his domicile to another place is a citizen within the meaning of the act of congress as to suing or being sued in this court, whether he is yet allowed to vote and to hold office or not in the state of his new domicile. *Catlett v. Pacific Ins. Co.*, 1 Paine, 594. It follows, then, that as for the purposes of jurisdiction in this court, a permanent residence generally constitutes citizenship, and controls our proceedings, and as, before the filing of the bill in this case, we are satisfied that the respondent had removed to Virginia with a view to make it his permanent abode, he was not at that time a citizen of Maine.

Bill dismissed for want of jurisdiction.

PENNSYLVANIA v. RAVENEL.

(21 Howard, 103-112. 1858.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the eastern district of Pennsylvania.

The action was brought by the state of Pennsylvania against the defendant, executor of the late Mrs. Kohne, to recover the sum of \$5,820.23, called a collateral-inheritance tax, assessed upon the personal estate of the testatrix. By the law of Pennsylvania, where the property of the deceased passes to his or her collateral heirs, or to strangers, either by the law concerning intestate estates or by will, it is made subject to a specific taxation for the benefit of the state. This tax is five per centum on the clear value of the estate. *Brightly & Purdon*, p. 138; Act 22d April, 1846, sec. 14. And according to the construction of these acts imposing the tax it is held, if a decedent be domiciled in the state at the time of his or her death, stocks of other states or of corporations of other states, and debts due in other states in the hands of the executors or administrators, are liable to this tax. 4 Harr., 63; 18 Howard's Rep.

But if the domicile of the deceased be not in Pennsylvania, then the estate is not subject to the tax. Mrs. Kohne died in the city of Philadelphia in March, 1852, and the question in the court below was whether or not she was

domiciled in Pennsylvania at the time of her death or in the state of South Carolina. The jury, under the charge of the court, found a verdict for the defendant. The case is before us on four exceptions taken to the charge of the court. The first three it is not material to notice further than to say that the two first are founded upon a misapprehension of the instructions given to the jury; and the third is not maintainable, as the instruction in the connection in which it is found is unobjectionable.

§ 39. *Question of domicile a mixed question of law and fact. Province of court and jury. Wife's domicile presumed that of her husband. Declarations with acts may be conclusive. Court may instruct as to effect of facts, if found.*

The fourth exception is that the court, in the charge, took the fact of domicile from the jury. This exception, we think, is founded in a misapprehension of the instructions given. The court, after stating to the jury that the question of domicile was one of mixed law and fact, observed that it was for the court to instruct them what constituted a domicile, and for the jury to apply the principles of law governing it to the facts as found by them; that the jury had no right to disregard the law as laid down by the court, and the court had no right to dictate to them as respected the facts, which they must find on their own responsibility. The court then stated to the jury the principles of law applicable to the question of domicile, to which no exception has been taken. Also, that as it had been admitted Mr. Kohne, the husband, who died in Philadelphia in 1829, had his domicile in Pennsylvania at the time of his death, the domicile of the wife must be taken as in that state at the time, and submitted the question whether or not she had since changed it to the state of South Carolina; and then, after referring to the leading facts given in evidence and relied on to establish a change of domicile, observed, that if the jury believe this evidence the domicile of Mrs. Kohne was in South Carolina.

§ 40. — *effect of acts and declarations as determining domicile.*

The court further say that the mere speaking of a place as a home, without any act showing an intention to return to it, would amount to nothing. But if acts and the language concur, as proved by the witnesses in the case, it would be a denial to the deceased of the right to choose her own domicile, not to allow her acts and declarations, continued for many years, to be conclusive of the fact. We perceive nothing in the instructions of the court, or in the view of the case as presented to the jury, by which the question of domicile, so far as it depended upon the facts, was taken from the jury. The evidence was very strong in support of a change of domicile by Mrs. Kohne after the death of her husband, and, if believed by the jury, it was not too much to say, as matter of law, that they should find for the defendant. The judgment of the court below is affirmed.

Dissenting opinion by MR. JUSTICE DANIEL.

I cannot concur in the opinion of the court in this case.

Had I been acting as a juror upon the trial of this cause, it is more than probable that the conclusion formed by the jury upon the evidence disclosed by the record is identical with that at which I should have arrived. And, further, had it been within the legitimate province of the court, in the attitude of the case before it, to declare what ought to be the deductions from facts either established in evidence, or presumed or supposed by the court to have been established, or even from facts admitted by the parties on the trial, then

exception to the charge of the court in this case could not properly be taken. The objection to the charge, and a fatal objection to my mind, arises from the principle that the court had no authority to pass upon or to give any opinion in relation to facts, either established by testimony or admitted or presumed, as to what those facts amounted to, or as to the correctness or the absurdity of any deduction which the jury might draw from them. The power of the court was limited absolutely to the legality or relevancy of the testimony. The weight or effect of the testimony, or the deductions to be drawn from it, were peculiarly and exclusively within the province of the jury; and the court had no power to inform them or intimate that evidence, either exhibited in reality or presumed, should be construed in any particular way, or to say to them *a priori* that an interpretation different from that of the court, as to the weight of evidence, would be absurd. Should the conclusion of the jury upon the weight of evidence be never so absurd, still it is the peculiar province of the jury to weigh that evidence, and to draw their own independent inferences from it; and the only legitimate corrective is to be found in the award of a new trial, or by a case agreed, or a demurrer to evidence. If the court can *a priori* direct the jury what the evidence, either made out in proof or hypothetically stated, really amounts to, the trial by jury becomes a cumbersome formality, and had as well, nay, had better be dispensed with, inasmuch as in the solemn administration of justice there should be as little that is useless, burdensome, or pretended, as possible. To show the character of that portion of the charge of the court regarded as exceptionable, it is here inserted as follows, viz:

"If the jury find that after his death (the death of the husband) she (Mrs. Kohne) returned to her former domicile in Charleston, took possession of the house and servants devised to her, lived in that house six or seven months of every year, calling it her home, spending only a few weeks in the spring and fall in her house here, and the remainder of the summer at watering places; coming north in the summer for the sake of her health, always intending to return to her house in Charleston; that she was hindered returning the last time from sickness; if she consulted counsel how she might avoid giving any pretense to the tax gatherers of Pennsylvania to treat her as domiciled here; if she carefully denied at all times her citizenship in Philadelphia, even to erasing it from printed lists of her church donations, as the assertion of a falsehood; if she refused to have some of her furniture removed here, for fear such a fact would be seized upon, after her death, for the purpose of asserting her domicile here; if she called herself, in her will, 'of Charleston;' if, when absent from that place, she always spoke of returning to it as her home, and did return to it as such, till hindered by sickness,—if the jury believed this evidence of defendant's witnesses, testimony which has not been contradicted or denied, it would be absurd to say her domicile was not where she asserted it to be, to wit, in the city of Charleston."

Regarding this portion of the charge as tending to confound the powers of the court and the jury, I think that the judgment of the circuit court should be reversed, and the case remanded for a new trial.

§ 41. Domicile defined.—The place to which a person removes, with the intention of remaining for an indefinite time, and as a place of present domicile, is his domicile, notwithstanding he may entertain a floating intention of removing at some future period. *Harris v. Firth*,* 4 Cr. C. C., 710. See § 1.

§ 42. Domicile depends not only on the acts but the secret or declared intentions of the party of whom it is averred. *Ewing v. Blight*, 3 Wall. Jr., 184. See §§ 75, 76.

§ 42. An actual residence in a place, with the intention that that is to be a principal and permanent residence, makes a domicile; and absence from such place, of a temporary nature, or in the exercise of some particular profession, office or calling, does not change the domicile. *Ex parte Kenyon*, 5 Dill., 885. See §§ 62-70.

§ 44. How established — Tests. — In order to establish a right of domicile in a particular place a person must sufficiently make known his intention to fix it there, either tacitly or by express declarations. The question whether he has sufficiently made known his intention of fixing himself there permanently must depend upon all the circumstances in the case. If he has made no express declarations, and his secret intention is to be discovered, his acts must be attended to as affording the most satisfactory evidence of intention. *The Venus*, 8 Cr., 253. See §§ 75, 76.

§ 45. In questions of domicile the chief point to be considered is the *animus manendi*. If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by a residence even of a few days. *Ibid.*

§ 46. In order to constitute a domicile of choice there must be actual residence in the place with the intention that it be a principal and permanent residence. The intention may be inferred from the circumstances and condition in which a person may be as to the domicile of his origin, or from the seat of his fortune, his family, or his pursuits in life. *Ennis v. Smith*, 14 How., 400.

§ 47. Openly declared intention together with residence, however short, is sufficient to establish domicile. *Johnson v. 21 Bales, etc., of Merchandise*, 2 Paine, 601. See §§ 90, 91.

§ 48. In the ascertainment of domicile the *animus manendi* is the principal point to be considered. If the intention to establish a permanent residence be ascertained, the recency of the establishment, though it may have been for a day only, is immaterial. The intent is, in each case, the real subject of inquiry, and the circumstances requisite to establish the domicile are flexible, and easily accommodated to the real truth and equity of the case. *Levy's Case*,* *Election Cases*, 41. See §§ 75, 76.

§ 49. A mere coming for a transitory purpose or visit does not constitute a residence. There must be the intent of staying, or abiding for permanent purposes, and a beginning of it, at least, to constitute a residence, though it is not continued. *United States v. The Schooner Penelope*, 2 Pet. Adm., 438.

§ 50. Presumed from residence. — Where a person lives is taken *prima facie* to be his domicile, unless there be some motive for that residence not inconsistent with a clearly established intention to retain a permanent residence in another place. *Ennis v. Smith*, 14 How., 400; *Mitchell v. United States*, 21 Wall., 350. See §§ 92, 93.

§ 51. Continuance. — A domicile once existing continues till another is acquired. *Desmare v. United States*, 3 Otto, 605.

§ 52. Must exist somewhere. — A person cannot be without a legal domicile somewhere. *Ibid.*

§ 53. In hostile country. — No residence establishes a domicile as to any hostile purpose or as operating a condemnation of goods, but that which is taken up or continued after the commencement of hostilities. *Johnson v. 21 Bales, etc., of Merchandise*, 2 Paine, 601. See §§ 95, 96.

§ 54. As to citizenship. — Residence is not synonymous with citizenship. It is not sufficient to give jurisdiction to the federal courts to allege that the parties "reside" in different states. *Parker v. Overman*, 18 How., 137.

§ 55. Can exist in one state only. — A person cannot be a resident of two states at the same time. *Brent v. Armfield*,* 4 Cr. C. C., 579.

§ 56. Acquisition of. — To constitute a new domicile, two things are indispensable: First, residence in the new locality; and second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicile for another. *Mitchell v. United States*, 21 Wall., 350. See §§ 2-4.

§ 57. One who removes to a foreign country, settles himself there, and engages in the trade of the country, is presumed to have such an intention to reside there permanently as to stamp him with the national character of that country. He is presumed to be there *animo manendi*, and if a state of war should bring his national character in question, it lies upon him to explain the circumstances of his residence. *The Venus*, 8 Cr., 253. See §§ 50, 92, 93, 95, 96.

§ 58. A domicile in a foreign country is acquired by a residence there with an intention to make it a permanent place of abode. *Ibid.*

§ 59. A person left New York and went to Brooklyn for the purpose of enlisting as a marine, intending to return to New York if he was not accepted. He was accepted and resided in the marine barracks at the navy yard in Brooklyn for some time. Held, that he did not acquire a

residence in Brooklyn, even though it was usual for marines to remain in the navy yard for the first two years after enlistment; and the fact that he testified that he intended to return to Brooklyn when his term of enlistment should expire is of no avail, as there was no testimony that he intended then to remain there. *In re Green*, 5 Fed. R., 148.

§ 60. Where a man removes from one state to another with the intention of making the latter his permanent place of abode, he acquires a domicile there, notwithstanding the fact that he left behind him an estate which he cultivates, and sometimes visits, and whilst there keeps house, and is even elected into the legislature of the state he has left. *Butler v. Hopper*, 1 Wash., 499.

§ 61. A domicile is not acquired by a residence for temporary purposes. It must be a permanent residence with an intention of always staying there. The existence of this intention must be manifested by overt acts, in explanation of which, if doubtful, it seems that the declarations of the party are admissible. *Prentiss v. Barton*, 1 Marsh., 399 (COURTS, § 1046).

§ 62. Change.—The removal from one place to another *animus manendi* constitutes a change of domicile whatever may be the motive for removal, but a temporary change of place without any intention of permanent residence does not. *Case v. Clarke*, 5 Mason, 70 (COURTS, § 1048).

§ 63. A removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time is not a change of it. But when there is a removal, unless it can be shown or inferred from circumstances that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, office or calling, it does change the domicile. *Ennis v. Smith*, 14 How., 400.

§ 64. A temporary excursion, either to the place of original domicile or to any other, shall not be deemed to interrupt residence. *Johnson v. 21 Bales, etc., of Merchandise*, 2 Paine, 601.

§ 65. A resident of a territory who removes to a state on the breaking out of an Indian war, but who intends to return and always considers the territory as his home, will not be deemed to have lost his residence by voting for president in the state where sojourning. *Clarke v. Territory*,* 1 Wash. T'y, 82.

§ 66. A change of domicile will not be presumed from a residence in another state as a clerk, where such residence is not shown to have been otherwise than temporary. *Catlin v. Gladding*, 4 Mason, 308 (COURTS, § 1049).

§ 67. If a person should think proper to change his domicile and should remove with his family to another state, with a *bona fide* intention of abandoning his former place of residence, and to become a resident and inhabitant of the state to which he removes, he becomes, immediately upon such removal, accompanied by such intention, a citizen of such state, even though one of the motives in making the change would be that he would become thereby capable of maintaining an action in a federal court in the state from whence he removed. *Cooper v. Galbraith*, 8 Wash., 546.

§ 68. A person left Cincinnati in 1856, and removed to Chicago, intending to make that his home. He left his family in Cincinnati, so that his children might be educated in the high school. He continued in business in Chicago until 1859, when he returned to Cincinnati, on account of the opposition of his wife to removing to Chicago. It appeared that he had voted twice in Chicago, and there was no doubt of his intention to make that his permanent residence. *Held*, that in 1858 he was a citizen of Illinois, and that the fact that he finally left Chicago and returned to his former residence did not affect or invalidate his actual residence at that time. *Blair v. The Western Female Seminary*, 1 Bond, 578 (COURTS, § 1047).

§ 69. A person who was a resident of Cincinnati for many years removed his family into Kentucky temporarily and continued to vote and do business in Cincinnati, and later removed his family back to Cincinnati pursuant to his original intention. *Held*, that he was continuously a citizen of Ohio. *United States v. Thorpe*, 2 Bond, 840.

§ 70. Where a person leaves his residence it will not be presumed that he intends to take up his abode in territory where it would be illegal for him to do so. *Mitchell v. United States*, 21 Wall., 350.

§ 71. — **burden of proof.**—Where a change of domicile is alleged the burden of proof is on the party making the allegation. *Mitchell v. United States*, 21 Wall., 350; *Desmare v. United States*, 8 Otto, 605. See § 14.

§ 72. Loss of.—Domicile can only be lost by an actual departure from the country in which it is established, or at least by some act which may be deemed an actual commencement of his movement from it, and a real, substantial endeavor to regain his native or prior domicile. *Johnson v. 21 Bales, etc., of Merchandise*, 2 Paine, 601. See § 100.

§ 73. A native of Great Britain, who has become a naturalized resident of the United States, does not lose his domicile in the United States by reason of a temporary absence in a British possession for business purposes, or by a merely colorable declaration that he was a British sub-

ject, made in peace for the purposes of protection of his interests as a trader. *The Ship Ann Green and Cargo*, 1 Gall., 274.

§ 74. *How thrown off.*—The domicile which a person acquires by residence may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he has resided on his way to another. It no longer adheres to a party from the moment he puts himself in motion to quit the country *sine animo revertendi*. Declarations of such intent ought not to be relied upon if in the least rendered doubtful. But declarations accompanied by unequivocal acts evincing such an intention furnish the strongest evidence afforded by the nature of the case. *The Venus*, 8 Cr., 253. See §§ 89-91.

§ 75. *Intent, how evidenced.*—The intention of a party in changing his residence is to be collected from the acts and not from the declarations of the party. If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the federal courts, and that fact be made out by his acts, there is no change of domicile, however frequent and public his declarations to the contrary have been. If, on the other hand, the sincerity of the removal for the purpose of permanent residence be not questioned, and the person's acts correspond with such intention, the change of domicile is complete, and the law forces upon him the character of a citizen of the state in which he is domiciled, though he may uniformly declare that he continues to reside in the state from which he has removed. *Butler v. Farnsworth*, 4 Wash., 101 (COURTS, §§ 1044, 1045).

§ 76. *Intent is the great criterion by which the character of domicile is determined.* When a person avows his intention to change his residence, and acts accordingly, his declarations on the subject are generally received as satisfactory evidence of his intent; but in the absence of such evidence, the sale of his property, and the settling up of his business before emigration, the removal of his family, arrangements for a continuing place of abode, the acquisition of property after his removal, the formation of durable business relations, and the lapse of a long period under such circumstances, are among the leading considerations from which the intent to make a permanent change of domicile is inferred. *Expatriation*,* 14 Op. Att'y Gen., 295.

§ 77. *Question of fact.*—Whether a man resides in a particular place or not at a particular time is a question of fact to be decided from declarations, acts and circumstances of the person concerned, made and existing prior to and at the time the controversy about his residence originates. Temporary absence does not necessarily affect the question, if, in fact, he looks to it and treats it as his actual, permanent home. *Lee v. Simonds*,* 1 Or., 158. But see § 16.

§ 78. *Domicile of origin.*—The place of birth of a person is considered as his domicile, if it was at the time of his birth the domicile of his parents, and the domicile of birth of minors continues until they have obtained a new domicile. *Powers v. Mortree*,* 4 Am. L. Reg., 427. See § 11.

§ 79. — *presumed to continue.*—It is presumed that a person retains the domicile of his origin, unless a change is proved, and the person asserting such a change must prove it. *Ennis v. Smith*, 14 How., 400.

§ 80. — *reversion of.*—The domicile of origin easily reverts, and fewer circumstances are necessary to constitute a domicile in the case of a native subject, than to impress that character on one originally of another country. *Johnson v. Bales*, etc., of Merchandise, 2 Paine, 601; *Expatriation*,* 14 Op. Att'y Gen., 295; *Catlin v. Gladding*, 4 Mason, 308 (COURTS, § 1049).

§ 81. So where a person who has been settled in business in another state, returns to his old home and resides with his mother after his failure in business, it will be presumed that his original domicile attaches. *Catlin v. Gladding*, 4 Mason, 308 (COURTS, § 1049).

§ 82. A person who, after having left his country, returns to it and re-acquires his native domicile, becomes a reintegrated citizen, and cannot, by an emigration afterwards, *flagrante bello*, acquire a neutral character so as to separate himself from that of his native country. *The Dos Hermanos*, 2 Wheat., 76.

§ 83. Where a person leaves his acquired domicile with the intention of returning to the domicile of his origin, the latter revives and attaches *eo instanti*. *In re Walker*, 1 Low., 287.

§ 84. P. was born in Massachusetts, where his parents resided. He remained there till after he married. He came to Georgetown, D. C., in 1801, and joined in editing a paper there till 1802, when he sold out his interest and removed to Baltimore. In 1803 he returned to Massachusetts, and, leaving his wife with his father, went to England. On his return he went to Washington as a reporter for a Philadelphia paper. *Held*, that when he removed from Baltimore he recovered his original domicile, and his residence in Washington as a reporter was not an abandonment of it. *Prentiss v. Barton*, 1 Marsh., 389 (COURTS, § 1046).

§ 85. The domicile of origin does not revert by a return to the native country for a mere temporary purpose. So, where a person who is domiciled in a foreign country leaves his commercial establishment in that country in the hands of his clerks, and returns to his native country on mercantile business, with the intention of returning to his foreign domicile, his native domicile does not revert. *The Friendschaft*, 8 Wheat., 14.

§ 86. — **not lost by forced exile.**—The domicile of origin is not lost by a forced exile in a foreign country. *Ennis v. Smith*, 14 How., 400. See § 98.

§ 87. **Commercial domicile.**—A mere commercial domicile acquired in a time of peace, where the person intends to remain as long as he may find it advantageous and proper to do so, ought not to be presumed positively to continue longer than a state of peace, especially if he be a member of a commercial house in his native land. (*Per MARSHALL, C. J., dissenting.*) *The Venus*, 8 Cr., 258. See §§ 53, 95, 96.

§ 88. For the purposes of trade and commerce a person acquires the national character of the country of his domicile, whether it is, in war, that of an enemy or a neutral; or in peace, that of any alien friend. *Wildes v. Parker*, 3 Sumn., 593.

§ 89. **Declarations.**—The declarations and acts of a party are admissible to qualify and explain his intention in removing, or the character of his residence, in a question of domicile. *Tobin v. Walkinshaw*, 1 McAl., 186 (CITIZENS, §§ 84-96). See §§ 6, 75.

§ 90. Mere declarations of intention to remove, unaccompanied by acts, will not change a domicile. *Johnson v. 21 Bales, etc., of Merchandise*, 2 Paine, 601. See §§ 47, 74.

§ 91. The declarations of a person as to his domicile, made *ante litem motam*, are *prima facie* evidence of such domicile. *Ennis v. Smith*, 14 How., 400. See §§ 6, 47.

§ 92. **Presumptions—from residence.**—The presumption arising from actual residence in a place is that such residence is *animo manendi*, and it lies upon the resident to remove the presumption if necessary for his safety. *Rogers v. The Mexican Schooner Amado*, Newb., 406. See §§ 8, 9, 50.

§ 93. Residence is *prima facie* evidence of national character; susceptible, however, at all times, of explanation. If it be for a special purpose, and transient in its nature, it shall not destroy the original or prior national character. But if it be taken up *animo manendi*, then it becomes a domicile, superadding to the original or prior character the rights and privileges, as well as the penalties and disabilities, of a citizen or subject of the country in which the residence is established. *Johnson v. 21 Bales, etc., of Merchandise*, 2 Paine, 601.

§ 94. — **of married man.**—The residence of a married man is presumed to be where his family resides, and considerable evidence is necessary to overcome that presumption. *Lee v. Simonds*,* 1 Or., 158.

§ 95. — **in hostile country.**—Long continued residence in a country is presumed to be with intention to make that country a residence. *Johnson v. 21 Bales, etc., of Merchandise*, 2 Paine, 601. See § 53.

§ 96. Residence in a hostile country is presumed to be with intention to remain there. This presumption cannot be overcome by declarations of intention to return, but only by acts pursuant to such an intention. Shipment of goods is not evidence of such intention unless the return is contemporaneous, or so connected with it in point of time as to form but one transaction. *Ibid.*

§ 97. — **of continuance.**—Though generally a domicile once acquired is presumed to continue, yet such presumption will not be indulged where a person would thereby become an enemy of his government. *Stoughton v. Hill*, 3 Woods, 404.

§ 98. — **of change.**—A change of domicile was not presumed in case of a refugee flying to loyal territory on the breaking out of the late rebellion. *Quigley v. United States*,* 13 Ct. Cl., 367. See § 86.

§ 99. A change of residence is *prima facie* evidence of a change of domicile; but where it is explained and shown to have been for mere temporary purposes, the presumption is rebutted. *Butler v. Farnsworth*, 4 Wash., 101 (COURTS, §§ 1044-45).

§ 100. A domicile is not lost until another is acquired, and, where no change is shown, it will not be presumed. *Quigley v. United States*,* 13 Ct. Cl., 367.

§ 101. **Domicile of minors.**—The domicile of a person's parents at the time of his birth, or what is termed the domicile of origin, constitutes the domicile of an infant, and continues until abandoned, or until the acquisition of a new domicile. As it gives political rights which are not lost by a mere change of domicile, it is recovered by any manifestation of a disposition to resume the native character. *Prentiss v. Barton*, 1 Marsh., 389 (COURTS, § 1046). See §§ 11, 76-86.

§ 102. The domicile of the father fixes the domicile of his minor child, if under his control and direction. *Levy's Case*,* Election Cases, 41.

§ 103. The domicile of minor children is fixed by that of their parents, and if a father dies his last domicile fixes that of his infant children. *Powers v. Mortee*,* 4 Am. L. Reg., 427.

§ 104. The place where minor children were born, and where their parents lived and died, and where their property is situated, is their domicile, notwithstanding a temporary absence therefrom. *Sprague v. Litherberry*, 4 McL., 442.

§ 105. The domicile of infants, after the death of their father, is that of their step-mother. *Ibid.*

§ 106. A minor child cannot acquire a domicile separate from his father, unless emancipated from his father's control, though *it seems* that he may after such emancipation. *Woolridge v. McKenna*, 8 Fed. R., 650.

§ 107. Of husband and wife.—The domicile of a husband fixes that of his wife, though they are in fact living separate. *Oglesby v. Sillom*, 9 Fed. R., 860. See §§ 12, 13.

§ 108. A wife may acquire a separate domicile from her husband whenever it is necessary or proper that she should do so. The right springs from the necessity of its exercise, and endures as long as the necessity continues. Proceedings for a divorce may be instituted where the wife has her domicile. The place of the husband's domicile is of no consequence. *Cheever v. Wilson*, 9 Wall., 108.

§ 109. — after divorce.—A wife divorced *a mensa et thoro* may acquire a domicile and citizenship different from her husband, so as to sue in a federal court for alimony adjudged her by the court decreeing the divorce. *Barber v. Barber*, 21 How., 582 (COURTS, §§ 903-12).

§ 110. Where a woman is divorced from her husband his domicile no longer fixes hers, but she is at liberty to acquire one of her own choosing. *Bennett v. Bennett*, Deady, 299.

§ 111. Of soldiers and sailors.—*It seems* that a soldier or sailor of the United States may acquire a residence while in service, as by purchasing or renting a dwelling. *In re Green*, 5 Fed. R., 148.

§ 112. Of United States government.—The United States in their sovereign capacity have no particular place of domicile, but possess in contemplation of the law an ubiquity throughout the Union. *Vaughan v. Northup*, 15 Pet., 1.

§ 113. Of corporations.—A corporation being a creature of the local law can have no other residence than within the sovereignty creating it. *Hume v. Pittsburgh, C. & St. L. R. Co.*, 8 Biss., 81.

§ 114. Miscellaneous.—A foreign domicile is one of the essentials of expatriation, but its acquirement does not of itself work expatriation. *Expatriation*,* 14 Op. Att'y Gen., 295.

§ 115. Residence gives national character independent of the political state or condition of the country in which it is established. *Johnson v. 21 Bales, etc., of Merchandise*, 2 Paine, 601. See § 1.

DONATION ACT.

See LAND.

DOWER.

See DOMESTIC RELATIONS.

DRAFT.

See WAR.

DRAFTS.

See BANKS; BILLS AND NOTES.

DRUNKENNESS.

See CONTRACTS, IV, 4; CRIMES.

DUE BILL.

See BILLS AND NOTES.

DUELING.

See **CRIMES**.

DUE PROCESS OF LAW.

See **CONSTITUTION AND LAWS, V.**

DUNNAGE.

See **CARRIERS**.

DURESS.

[See **CONTRACTS, IV, § 8**. As to liability of officers in case of the loss of money by force, see **BONDS, §§ 245-250, 263-273, 290**. Marital coercion, see **CRIMES, §§ 9-13**.]

§ 1. A conditional pardon accepted by an imprisoned convict is deemed to be accepted voluntarily and not under duress *per minas*, or by imprisonment. *Ex parte Wells*, 18 How., 307; *Greathouse's Case*, 2 Abb., 383 (**CRIMES, §§ 8257-62**).

§ 2. Money paid by a person lawfully arrested by order of the secretary of war for fraud, to obtain his release, is not money paid under duress of imprisonment so that it can be recovered back. *Hill v. United States*,* 9 Ct. Cl., 178.

§ 3. Criminal acts.—In order to convict a sailor of participating in receiving negroes on shipboard with intent to make slaves of them, it is necessary to find that in doing the acts charged he acted voluntarily, freely and willingly, without restraint from the facts and circumstances surrounding him. *United States v. Westervelt*, 5 Blatch., 80.

§ 4. The fear which the law recognizes as an excuse for the perpetration of an offense must proceed from an immediate and actual danger, threatening the very life of a party. The apprehension of any loss of property by waste, or fire, or even an apprehension of a slight or remote injury to the person, furnishes no excuse. *United States v. Vigol*, 2 Dall., 346.

§ 5. The only force which excuses a subordinate, who has taken part in a treasonable uprising upon the ground of compulsion, is force upon the person and present fear of death, which force and fear must continue during all the time of military service; and it is incumbent to show an actual force, and that he quitted the service as soon as he could. *United States v. Greiner*,* 4 Phil., 396.

§ 6. Submission to military authority.—During the late war a bank in New Orleans was put in liquidation by the federal general commanding, against the protest of its officers, and commissioners were appointed by him to settle up its affairs, who sold collaterals deposited with it for less than their face value. *Held*, that submission to the "superior force" of the commanding general was proper, and that the bank was not liable for the acts of the commissioners. *McLemore v. Louisiana State Bank*, 1 Otto, 27 (**BAILMENT, § 53**).

§ 7. Redemption from tax sale.—A payment of money to redeem lands in Kansas from a tax declared legal by the supreme court of the state, but subsequently declared illegal by the supreme court of the United States, cannot be recovered back, but must be taken to have been paid voluntarily. *Lamborn v. County Commissioners*, 7 Otto, 181.

§ 8. Execution of charter-parties to the government.—The owners of certain barges chartered them to the government during the late war. After using them for a time the quartermaster's department demanded that the owners should execute new charter-parties at a lower rate of compensation. It announced its purpose, in case of non-compliance on their part, to retain possession of the barges and withhold all compensation. The owners refused to comply and demanded their barges. The return was refused and the owners signed the new charter-parties, protesting that they did so against their wishes and under the pressure of financial necessity. Compensation for the use of the barges was made from time to time at the rate of the new charter-parties and was accepted without objection by the owners. *Held*, that the new charter-parties were not compelled by duress. *Silliman v. United States*, 11 Otto, 465.

§ 9. Requiring bond from subordinate officer.—An officer of the government has no right by color of his office to extort from a subordinate, as a condition of his holding office, a bond with a condition different from that required by law, and a bond so extorted is void. *United States v. Tingey*, 5 Pet., 115 (**BONDS, §§ 181-82**).

§ 10. **Accepting payment of a controverted demand.**—A person who without force or intimidation, and with full knowledge of all the facts in the case, accepts on account of an unliquidated and controverted demand a sum less than he claims and believes to be due him, and agrees to accept that sum in full satisfaction, will not be permitted to avoid his act on the ground that it was compelled by duress, even though his urgent pecuniary necessities led him to accept the compromise. *United States v. Child*, 12 Wall., 232.

§ 11. **Weak and inclusive evidence of duress held insufficient to avoid a mortgage.** *Insurance Co. v. Nelson*, 18 Otto, 544.

§ 12. **Extortion by officers.**—Factors, who were compelled by the officers of the government to pay an illegal exaction for permission to ship cotton, may recover the excess if their principals could do so. *Hamilton v. Dillin*,* 18 Int. Rev. Rec., 164.

§ 13. A sum exacted by officers of the government, and paid without protest, cannot be recovered back from the government, even though it may have been illegally exacted. *Ibid.*

§ 14. **Claim against the government—Release.**—The secretary of war appointed an *ex parte* commission to report on certain claims. On the claims of R. they reported in favor of allowing a certain sum, and required him to sign a release as a condition of receiving the amount allowed. The release was not under seal. *Held*, that it was not a bar to a recovery of the balance against the United States, the court of claims having been established afterwards. *Reese v. United States*,* 2 Ct. Cl., 1.

§ 15. A release exacted by a military commission, of a balance claimed on one account, as a condition of restoring to the claimant several vouchers for claims on which no deduction was made, is void as being exacted by duress of goods. *Livingston v. United States*,* 3 Ct. Cl., 181.

§ 16. **Payment of taxes.**—Where taxes are demanded by an officer having authority to collect them by distraint without action, there is sufficient duress of property to render the payment of such taxes in compliance with the demand involuntary. *Hendy v. Soule*, Deady, 400.

§ 17. **Breach of embargo law.**—Under the embargo law it was held that the necessity which would excuse a breach thereof must be greater than would excuse a deviation under a policy of insurance. It must be instant and imminent, and must leave the master without hope by ordinary means to comply with the law. It must be such as would not permit a different course without the greatest danger to life and property. *Ship Argo*, 1 Gall., 150.

§ 18. A ransom bond cannot be avoided on the ground of duress, though procured by threats to burn the ship and cargo if it was not given, where the capture was justified by probable cause. *Maisonnaire v. Keating*, 2 Gall., 325.

§ 19. **Revolt of crew.**—In case of a revolt against the authority of a ship captain, the fear which will excuse the crew from obeying him must be a fear of death, and such a fear that a man of ordinary fortitude and courage might yield to. *United States v. Haskell*, 4 Wash., 402.

§ 20. **Arrest of ship.**—A ship partly laden for a long voyage was arrested. To procure her release the owner entered into an agreement. *Held*, the arrest being illegal, that the contract was void for duress of property. *Ship Orpheus*, 3 Ware, 143 (COURTS, §§ 290-94).

§ 21. **Defense against a mortgage.**—Duress in the execution of a mortgage is not a defense to an action to foreclose the mortgage, brought by a purchaser of the note and mortgage before maturity and without notice. *Beals v. Neddo*, 1 McC., 206 (CONV., § 783).

DUTIES.

* See REVENUE.

DUTIES ON TONNAGE.

See CONSTITUTION AND LAWS, VIII, §.

DUTY BOND.

See REVENUE.

DYING DECLARATIONS.

See EVIDENCE.

EASEMENTS.

[See DEDICATION; EMINENT DOMAIN.]

SUMMARY — *What rights pass with the conveyance of a house, §§ 1, 2.*

§ 1. When a house or store is conveyed by the owner, everything then belonging to and in use for the house or store, as an incident or appurtenance, passes by the grant. It is implied from the nature of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner and with the same beneficial rights as were then in use and belonged to it. *United States v. Appleton, §§ 3, 4.*

§ 2. A grant of a part of a building passes the right to use a side door opening on a piazza belonging to another part of the building. *Ibid.*

[NOTES.— See §§ 5-25.]

UNITED STATES v. APPLETON.

(Circuit Court for Massachusetts: 1 Sumner, 492-503. 1833.)

STATEMENT OF FACTS.— Appleton owned one wing of a building, the central part of which was owned by the United States and used as a custom-house. Appleton purchased in 1811 and the United States in 1816, but the central part had been used as a custom-house under a lease since 1808. It appears that there was a wing on each side of the main building, and that the latter was set further back from the street than were the wings, and had a piazza in front. In each of the wings there was a side door opening on and swinging over a part of the piazza, by means of which the occupants of the wings received light and had a passageway to and from Custom-House street. These doors had been thus used by the occupants of the wings from the time of the erection of the building.

Opinion by STORY, J.

The question is, whether the defendant, Appleton, in virtue of the conveyance to him, is entitled to swing the side door of his store over the piazza of the custom-house, and to pass in and out of his store through that side-door into Custom-House street. In other words, is he entitled to the use of that door and the piazza as a passage from and to Custom-House street? It appears to me that upon principle and authority he is so entitled.

§ 3. *A conveyance of a house passes everything belonging to and in use for the house.*

The general rule of law is, that when a house or store is conveyed by the owner thereof, everything then belonging to, and in use for, the house or store, as an incident or appurtenance, passes by the grant. It is implied from the nature of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner, and with the same beneficial rights, as were then in use and belonged to it. The question does not turn upon any point as to the extinguishment of any pre-existing rights by unity of possession. But it is strictly a question, what passes by the grant. Thus, if a man sells a mill which at the time has a particular stream of water flowing to it, the right to the water passes as an appurtenance, although the grantor was, at the time of the grant, the owner of all the stream above and below the mill. And it will make no difference that the mill was once another person's; and that the adverse right to use the stream had been acquired by the former owner, and might have been afterwards extinguished by unity of possession in the grantor. The law gives a reasonable intendment in all such cases to

the grant, and passes with the property all those easements and privileges which at the time belong to it, and are in use as appurtenances. Mr. Justice Doddridge, in *Surrey v. Pigot, Popham, R.*, 166, put the very case. "A man" (said he) "owns a mill and afterwards purchases the land upon which the stream goes which runs to the mill, and afterwards aliens the mill, the water-course remains." Let us take another case. A man sells a dwelling-house with windows then looking into his own adjacent lands. There can be no doubt that the grant carries with it the right to the enjoyment of the light of those windows, and that the grantor cannot, by building on his adjacent land, entitle himself to obstruct the light or close up the windows. Mr. Justice Bayley, in a very late case, put the very illustration. "If" (said he) "I have a house surrounded by my land and sell the house, I sell the right to light from the windows. The sale of the house, as it stands, gives a right to the light coming in at the windows, *without necessity* for twenty years' possession of the easement." *Canham v. Fisk*, 2 Tyrw., 155, 157. He also put another case: "Suppose" (said he) "the owner of two fields sells one having a stream of water flowing through it; can the vendee stop that water-course? *Prima facie*, no exception in the conveyance could be presumed." *Id.* This is the converse case, for here the law gives a common-sense construction to the grant and supposes that each field has the appurtenances thereof *in statu quo*, notwithstanding the grant. *Hinchliffe v. Kinnoul*, 5 Bing. N. C., 24, 25.

§ 4. *Circumstances and situation of the parties to be considered in construing a grant.*

It has been very correctly stated at the bar that in the construction of grants the court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country and the state of the thing granted, for the purpose of ascertaining the intention of the parties. Bigelow's Dig., Conveyance, S., p. 211. In truth, every grant of a thing naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for. Here, the side door in question was in actual use, as an appurtenance *de facto*, at the time of the grant. Could the owners of the central building on the next day after have shut it? Could they have shut out all the light of the window in the upper part of it? Could they have built down to Custom-House street and filled up the piazza? In my opinion it is most clear that they could not. Their grant carried by necessary implication a right to the door and window, and the passage, as it had been and as it then was used. The case of *Nicholas v. Chamberlain*, Cro. Jac. R., 121, is in point. So is the case of *Staples v. Hayden*, 6 Mod. R., 1, 4, notwithstanding the criticism which has been passed upon it at the bar. There, the third point decided by the court was that "if one be seized of Blackacre and Whiteacre, and use a way over Whiteacre from Blackacre to a mill, river, etc., and he grant Blackacre to B. with all the ways, easements, etc., the grantee shall have the same conveniency that the grantor had while he had Blackacre." The report of the same case in 2 *Ld. Raym. R.*, 922, is quite imperfect and far less satisfactory. And Mr. Chancellor Kent, in his learned Commentaries, fully sustains the doctrine in 6 *Mod. R.*, 4. 3 *Kent's Comm.*, Lect. 51, p. 420 (2d ed.).

It is observable that in this case reliance is placed on the language of the grant, "with all the ways," etc. But this is wholly unnecessary, for whatever are properly incidents and appurtenances of the grant will pass without the word "appurtenances," by mere operation of law. So it is laid down by

Lord Coke in *Co. Litt.*, 307. The same doctrine is affirmed by Lord Chief Baron Comyns (*Comyns' Dig.*, Grant, E., 11; *Hinchliffe v. Kinnoul*, 5 Bing. N. C., 24); and it has been fully supported by the supreme court of Massachusetts in a very recent case. *Kent v. Waite*, 10 Pick., 138.

The doctrine of the same court also, in the cases of *Grant v. Chase*, 17 Mass. R., 443, 447, 448, and *Story v. Odin*, 12 Mass. R., 157, especially the latter, appears to me fully to support my present opinion. The question is not indeed new to me; for I had occasion, in the case of *Hazard v. Robinson*, 3 Mason, R., 272, to examine the subject at large. I adhere to the doctrine stated in that opinion, which covers the whole ground of the present question.

If there had been any doubt upon the conveyance, which I think there is not, the subsequent usage would, in my judgment, be conclusive as to the construction put upon the conveyance by all the parties in interest.

My opinion, therefore, is that judgment upon the statement of facts ought to be for the defendant.

§ 5. **Defined — Fee — Revocation.**— An easement is a liberty, privilege or advantage which one may have in the lands of another without profit. The owner of the fee cannot revoke the license granted. The fee will remain in the grantor or his grantees, but the right to the easement is paramount and does not require the fee for its protection. So a grant by the government to a railway company of the right to maintain its tracks across a military reservation, made without any limitation as to time, conveys an irrevocable easement. *United States v. Baltimore & Ohio R. Co.*, 1 Hughes, 138.

§ 6. A right cannot become appurtenant, when.— A right not connected with the enjoyment or use of a tract of land cannot become so annexed to it as an incident of it as to become appurtenant to it. *Linthicum v. Ray*, 9 Wall., 241.

§ 7. **Highway — Title to soil.**— Where a mere easement is taken for a public highway, the soil and freehold remain in the owner of the land, incumbered only with the easement, and upon the discontinuance of the highway, the soil and freehold revert to the owner of the land. *Harris v. Elliott*, 10 Pet., 25.

§ 8. **Prescription** — In case of an easement an uninterrupted possession and use for twenty years is *prima facie*, and, if unexplained, is conclusive, evidence of a right. *Hazard v. Robinson*, 3 Mason, 276. As to the doctrine of prescription, see LIMITATIONS.

§ 9. A. and B. were respectively owners of an upper and lower mill-dam on a stream. B.'s dam interfered with the use of A.'s by backing up the water. It was afterwards lowered two feet, and remained thus for thirty-eight years, in which condition it did not interfere with A.'s water-power. B. sold his mill to A., who afterwards sold it to C., who raised the dam to the old height. In an action by A. it was held that by the lapse of time he had acquired the right to the unimpeded use of his water-power, and that by the unity of possession in himself, any adverse right of obstruction of the water to the prejudice of his mill, *in posse* and not *in esse*, was extinguished, and the grant to C. conveyed the lower mill with only such privileges and appurtenances as to the dam and water as were at that time used and appropriated to it. *Ibid.*

§ 10. Where a corporation has had for over twenty years a quiet, undisturbed and peaceable possession and use of the water of certain springs for the supply of an aqueduct, the law will conclusively presume a grant, and the fact that by decay of the aqueduct the water was permitted to resume its natural flow for three years, but without any intention to abandon its use, will not be deemed a surrender of the right acquired by the previous adverse possession. *Haight v. Proprietors of the Morris Aqueduct*, 4 Wash., 601.

§ 11. An action lies to enjoin the diversion of water from a spring which has been immemorially accustomed to flow across the lands of another. *Dexter v. Providence Aqueduct Co.*, 1 Story, 387.

§ 12. **Grant of incorporeal rights.**— While it is true that the ward's "rights, liberties, privileges and appurtenances" are not effectual to create any incorporeal right, but only pass such as have a legal existence and are annexed to the land granted, yet when a plat of lands, and a verbal description accompanying it, show the metes and bounds of the land conveyed, and also that certain incorporeal rights of way, common, or the like, are annexed to and to be enjoyed with the land conveyed, and the deed refers to the plat for a more full and clear description of what was intended to be conveyed, the incorporeal rights thus shown to be intended to be annexed to the land will pass with the deed. *Knowles v. Nichols*, 2 Curt., 571.

§ 13. Incorporeal rights may be inseparably annexed to a particular message, or tract of

land, by the grant which creates them, and makes them incapable of separate existence. But they may also be granted in gross, and afterwards, for the purposes of enjoyment, be annexed to a messuage or land, and again severed therefrom by a conveyance of the messuage or land, without the right, or a conveyance of the right without the land. *Lonsdale Co. v. Moies*,* 21 Law Rep., 658.

§ 14. Private way—Liability to public.—A proprietor of land who opens a private way upon his own premises is under no obligation to keep the same in repair for the safety of persons who may pass over it uninvited; and even when he permits persons generally to pass over such way he does not make himself liable for accidents or injuries which may result from the fact that the way is not a safe one, or not in repair. *Nugent v. Wann*, 1 McC., 488.

§ 15. So where defendant made an excavation in an alley, and the plaintiff, in passing through the alley, fell into the excavation and was injured, the court, in an action for damages, instructed the jury that the defendant was not liable if the alley was private, and was not used by the public generally with the knowledge and consent of defendant; that if the way was used by the public, and defendant was aware of the fact, and the plaintiff at the time he was injured was passing over the way on lawful business, then defendant was liable, unless plaintiff was guilty of contributory negligence. *Ibid*.

§ 16. Construction of agreement to open an alley.—A. and B., for the purpose of establishing an alley-way between their houses, entered into an indenture to the following effect: A. agreed to open a strip of land seven feet wide, and B. an adjoining strip three feet wide. Each covenanted with the other, his heirs, etc., that the strip opened by each respectively should forever remain open, free from buildings, encroachments, etc. A. was to have the use of the alley for light and air, and for passing and repassing as a gangway at all times, while B. had the use of it for light and air, and for the purpose of passing and repassing occasionally for repairing and other special purposes. The purchaser under A. erected a fence on the original boundary, leaving only three feet open next to B.'s estate. *Held*, that the true intent of the indenture was that there should always be kept open for the benefit of both parties, free of buildings and encroachments, a way of ten feet. The fact that B.'s right of use was limited did not in any way affect his right to have the way kept open. *Brownell v. Dyer*,* 5 Mason, 297.

§ 17. Right of way over government lands.—A power granted by congress to the president and secretary of war to sell certain real estate belonging to the government gives them the right to grant to a railway company the right to lay and maintain its tracks over such lands. *United States v. Baltimore & Ohio R. Co.*, 1 Hughes, 188.

§ 18. Every state has, by virtue of its sovereignty, the right to create easements in and upon lands of the United States within its borders by establishing highways or railroads across them. *United States v. The Railroad Bridge Co.*, 6 McL., 517.

§ 19. The grant by congress to a railway company of land to a certain width along its track for a right of way gives the company the right to an exclusive possession of such lands, which may be enforced by an action of ejectment. *Central Pacific Railroad Co. v. Benity*, 5 Saw., 118.

§ 20. Adverse title.—A party holding an easement under a grant cannot set up an adverse title acquired by him from a person out of possession, where there has been no disclaimer by him of his holding under such grant. *United States v. Baltimore & Ohio R. Co.*, 1 Hughes, 188.

§ 21. Rights in adjoining states.—A. owned half a dam and water-power, and the land to the thread of the stream, on one side of a river in Connecticut, and B. owned the other half of the dam and water-power, and the land to the thread of the stream, on the Rhode Island side of the river, and also half a dam above. B. constructed a canal from the upper dam on the Rhode Island side, which conveyed a portion of the water of the stream around the lower dam and into the river below it. *Held*, that the fact that A.'s land was in Connecticut did not give the easement appurtenant to it an existence in that state, but that it existed in Rhode Island, and the right of A. thereto was under the protection of, and governed by, the laws of Rhode Island. *Stillman v. White Rock Manufacturing Co.*, 3 Woodb. & M., 538.

§ 22. Partition walls.—It is a condition annexed to the title of every house lot in the city of Washington, that when the proprietor builds a partition wall between himself and his neighbor, he shall lay the foundation equally upon the lands of both, and that any person who shall afterwards use the partition wall, or any part of it, shall pay to the first builder a moiety of the charge of such part as he shall use. *Miller v. Elliot*, 5 Cr. C. C., 543.

§ 23. A grant of a right of common in a particular tract of land confers all such rights of common as the land may be capable of supporting. *Knowles v. Nichols*, 2 Curt., 571.

§ 24. The right to take sea-weed and sea-manure from a beach may be a commonable right in Rhode Island. *Ibid*.

§ 25. Right to dig ore.—A. the owner of a tract of land, granted a portion thereof to B., and covenanted, for himself his heirs, executors and administrators, with B., his heirs and as-

signs, that he and they might dig, take and carry away all the iron ore in the ungranted part, paying so much per ton. *Held*, that the deed did not grant the ore but simply the right to take it; that until the ore was severed it did not pass to the grantee; that the word *all* was not exclusive of the grantor's right, and that the grantee's right was indivisible, and unless the assignee was clothed with the whole right he could not support an action against the grantor as such assignee. *Grubb v. Bayard*, 2 Wall. Jr., 81 (CONTRACTS, §§ 1018-22).

ECCLESIASTICAL LAW.

See CHURCHES.

ECCLESIASTICAL RECORD.

See EVIDENCE.

EIGHT-HOUR LAW.

§ 1. Act construed.—The act of June 25, 1868, declaring "that eight hours shall constitute a day's work for all laborers, workmen and mechanics now employed or who may hereafter be employed by or on behalf of the government of the United States," was a direction by congress to the officers and agents of the United States, establishing the principle to be observed in the labor of those engaged in its service. It prescribed the length of time which should amount to a day's work, when no special agreement was made upon the subject. *United States v. Martin*, 4 Otto, 400.

§ 2. It did not establish the price to be paid for a day's labor, nor provide that the employer and the laborer should not agree with each other as to what time should constitute a day's work. *Ibid*.

§ 3. It is held that contracts fixing or giving a different length of time as a day's work are legal and binding upon the parties, and a laborer cannot recover for the time in excess of eight hours, where he continues, without protest or objection, to work twelve hours a day on being told that he must do so as a condition of remaining in the service. *Ibid*.

EJECTMENT.

See LAND.

ELECTIONS.*

[See CONSTITUTION AND LAWS, II, 2; VI, VII, IX; CRIMES, V, and §§ 2530-2606.]

SUMMARY—"Registration" as used in statutes of United States, §§ 1, 2; control of United States over, § 8.—Supervisors of election; rights and duties, §§ 4-7.—Judges of election; duties and liabilities, § 8.

§ 1. The preparation of assessment lists by the assessors of the different hundreds in Delaware, the completion of such lists by the levy courts of the different counties, and the compilation, by the clerks of the peace, of lists of voters for the use of inspectors of elections, constitute a registration of voters within the meaning of the statutes of the United States relating to the appointment of supervisors of election. *In re Appointment of Supervisors of Election*, §§ 9-18.

§ 2. The registration of voters contemplated by such statutes is not such a registration as shall be conclusive of the right of the persons embraced therein to vote. *Ibid*.

*Edited by CHARLES N. BROWN, Esq., of Madison, Wisconsin, under the supervision of the General Editor.

§ 3. The United States has a constitutional right to interfere in all cases of a registration of voters for an election for a member of congress. The statutes providing therefor are paramount to state laws and regulations. *In re Geissler*, §§ 14-16. See §§ 42, 43.

§ 4. Instructions by chief supervisor to supervisors of election relative to challenges and examinations of persons claiming to be naturalized citizens commented upon and approved. *In re Davenport*, §§ 17-19. See §§ 48, 49.

§ 5. Respective duties of supervisors of election and inspectors under state laws, in the registration of voters and the challenge and examination of persons offering to register. *Ibid.*

§ 6. Supervisors have no right to require applicants for registration to surrender alleged fraudulent certificates of naturalization. *Ibid.*

§ 7. A supervisor of elections has the power, in the absence of the marshal and his deputies, to preserve order, and to arrest without process any person interfering with him in the discharge of his duties as supervisor. *In re Geissler*, §§ 14-16.

§ 8. The duties of judges of elections under section 2 of the act of May 31, 1870, is to do whatever they are required to do under the state laws to enable a citizen to qualify himself for voting; but in order to maintain an action against such a judge for the penalty prescribed by said section, the plaintiff must prove that he was a citizen of the United States and then and there qualified to vote, and that the refusal to permit him to establish his qualification as an elector was on account of his race, color or previous condition of servitude; and whether such refusal was for that reason is a question of fact for the jury. *McKay v. Campbell*, §§ 20-26. See §§ 55, 56, 63.

[NOTES.—See §§ 27-94.]

IN RE APPOINTMENT OF SUPERVISORS OF ELECTION IN DELAWARE.

(Circuit Court for Delaware: 1 Federal Reporter, 1-14. 1890.)

MOTION for the appointment of supervisors of election.

§ 9. *Construction of statutes relating to the appointment of supervisors of election.*

Opinion by BRADFORD, J.

The provisions of the United States laws, which it is supposed cover this case, are found in sections 2011, 2012, 2013, 2014 and 2015 of the Revised Statutes of the United States, and in these words:

"Sec. 2011. Whenever, in any city or town having upwards of twenty thousand inhabitants, there are two citizens thereof, or whenever in any county or parish, in any congressional district, there are ten citizens thereof, of good standing, who, prior to any registration of voters for an election for representative or delegate in the congress of the United States, or prior to any election at which a representative or delegate in congress is to be voted for, may make known, in writing, to the judge of the circuit court of the United States for the circuit wherein such city or town, county or parish is situated, their desire to have such registration, or such election, or both, guarded and scrutinized, the judge, within not less than ten days prior to the registration, if one there be, or, if no registration be required, within not less than ten days prior to the election, shall open the circuit court at the most convenient point in the circuit.

"Sec. 2012. The court, when so opened by the judge, shall proceed to appoint and commission from day to day and from time to time, and under the hand of the judge and under the seal of the court, for each election district or voting precinct in such city or town, or for such election or voting precinct in the congressional district, as may have applied in the manner herein prescribed, and to revoke, change or renew such appointment from time to time, two citizens, residents of the city or town, or of the election district or voting precinct in the county or parish, who shall be of different political parties, and able to read and write the English language, and who shall be known and designated as supervisors of election.

"Sec. 2013. The circuit court when opened by the judge, as required in the two preceding sections, shall therefrom and thereafter, and up to and including the day following the day of election, be always open for the transaction of business under this title, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

"Sec. 2014. Whenever, from any cause, the judge of the circuit court, in any judicial circuit, is unable to perform and discharge the duties herein imposed, he is required to select and assign to the performance thereof in his place, such one of the judges of the district courts within his circuit as he may deem best; and, upon such selection and assignment being made, the district judge so designated shall perform and discharge, in place of the circuit judge, all the duties, powers and obligations imposed and conferred upon the circuit judge by the provisions hereof.

"Sec. 2015. The preceding section shall be construed to authorize each of the judges of the circuit courts of the United States to designate one or more of the judges of the district courts within his circuit to discharge the duties arising under this title."

There is no question raised now as to the appointment of supervisors of election to guard and scrutinize the elections. But it is denied that there is any registration of voters within the meaning of the act of congress, and that therefore the appointment of supervisors of election, with power to guard and scrutinize the assessment lists in the hands of the assessors and in the hands of the levy court, and the list of voters furnished by the clerks of the peace in the respective counties of the state for the use of the inspectors of election, is not warranted by law.

As this law, leaving out the question of constitutionality, is meant to be fair and impartial in its operation, and as its object and purpose is the protection to each citizen of the right of the elective franchise, both by securing his own vote and preventing the illegal votes of others, the construction of the act should be a liberal one, and such as to carry into effect the manifest intention of the framers of the law. And while the fact of penalties attached to the violation of the law should, as in every case demanding serious investigation, make more imperative the necessity for the judge to give a careful investigation to the case, I know of no rule of interpretation arising from that fact which should require a narrow and technical construction to such a statute—a statute which is eminently an enabling one.

§ 10. *What constitutes a registration of voters under section 2011.*

We are then brought to the consideration of the question what was the manifest intention of congress in the use of the words "registration of voters?" It will hardly be denied that, if these lists made by the assessors and the levy courts are lists of such a character that to be placed on them is a prerequisite to the right to vote, the guarding and scrutinizing such lists give the means of remedying the evil which congress designed to be remedied. And if it is a sound rule of interpretation or construction of a law that such a construction or interpretation should be given as will remove the evil sought to be removed, and protect the rights sought to be protected, then, unless there is something on the face of the acts of congress which in terms denies the applicability of the registration of voters therein named to the assessment lists

under the laws of Delaware, an adherence to this rule would compel the court to give to such a system the substantial character of a registration of voters. It is admitted in argument that if there was a system of registration of voters *eo nomine*, in this state, then the statute would apply, and the supervisors could guard and scrutinize such lists.

Now such registry-lists, *eo nomine*, are imperfect; they only make a *prima facie* case. No voter's right is extinguished by being omitted from that list, and no voter's right is secured by being illegally placed on it. The wrong done can be remedied at any time prior to the election; and yet such imperfect lists as these, under the name of registration of voters, congress, in the interests of the purity of the elective franchise, has ordered to be guarded and scrutinized. Now suppose, under the system of laws of the state of Delaware, the assessor makes list of persons owning and not owning property above the age of twenty-one years, and is required by law, under severe penalties, to place on that list every freeman in his hundred above the age of twenty-one years; and suppose, after the list is completed and corrected by the levy court in the latter part of March of every year, it is found that citizens qualified in every other respect to vote have, through inadvertence or corruption, been omitted from the lists; and suppose that omission is fatal, beyond the possibility of correction—an actual and utter extinguishment of such a citizen's right to vote,—can it be held with any reason that such a state of facts does not constitute a registration of voters within the true meaning and intent of congress? It is admitted by counsel for the objectors that the law will apply to imperfect and inconclusive lists of voters, provided they are called by law “registration of voters;” but to apply that law, when the necessity of guarding and scrutinizing is vastly increased, from the fact that the omission of the name from the assessment list is absolutely without remedy, is held by them to be unwarranted.

Now, what is there in the words “registration of voters” that should require such a construction of the law as to defeat the manifest intention of congress? It will be borne in mind that there is no such expression as “system of registration” or “registry laws,” and the only words to have a construction given to them are “registration, if one there be.” What is registration? It is the act of making a list, or catalogue, or schedule, or register. The word “registration” is an ordinary one; it is used in a generic sense, not technical; and, when applied to voters, unless there is a system of registration described by act of congress as such, and applied by the act as the only registration of voters under the law, it is any list, or register, or schedule containing names, the being on which lists, registers or schedules constitutes a prerequisite to voting. Any other construction would utterly defeat the purpose and intent of congress.

It is manifest that, under the construction contended for by the objectors, any state having in substance such a registration of voters could avoid the operation of the act by altering the name of the fact of registration, or altering the state laws in such a manner as to create a system of registration different from that contemplated by the act of congress, as likely to be most prevalent in the majority of the states. The registration of voters must be widely variant in different states of the Union, and because there are some acts which, under our system, supervisors may not be able to perform, but which, in the contemplation of congress, might be performed in some other

states, it does not follow that the former states have no such registration of voters as was contemplated by the act of congress. Is there *fit* and sufficient subject-matter for this act to work upon, is the pertinent question, and not—have we such a system of registration in all particulars as congress contemplated might exist in some of the states?

§ 11. *Law of Delaware as to qualifications and lists of electors.*

The constitutional provision in reference to voting is in these words: Art. 4. And in such elections every free white male citizen of the age of twenty-two years or upwards, having resided in the state one year next before the election, and the last month thereof in the county where he offers to vote, and having, within two years next before the election, paid a county tax which shall have been assessed at least six months before the election, shall enjoy the right of an elector; and every free white male citizen of the age of twenty-one years, and under the age of twenty-two years, having resided as aforesaid, shall be entitled to vote without payment of any tax.

The laws of the state governing the duties of assessors and the levy court are to be found under the titles "Levy Court," on page 60 and following, and of "Assessors," on page 78 and following, and under title of "Valuation of Property" and in other places in the Revised Statutes of Delaware, which we do not deem necessary to quote at large, an examination of which will, we think, show the truth of the following propositions:

1. There are officers appointed to make lists of voters, or to put on the assessment lists the names of persons who, if not thus assessed, will, though entitled in all other respects, be deprived of the right of voting.

2. Those officers are the assessors for the different hundreds and the levy courts of the different counties.

3. There are not only lists such as have been spoken of, and men authorized to make them, but there are times and places fixed by law for their examination, investigation, addition to and correction.

4. The laws of Delaware contemplate their being guarded and scrutinized by its own citizens.

5. There are times and places fixed by law for guarding and scrutinizing those lists in the hands of the assessor from the 10th day of January to the last Saturday in that month, and in the levy court during the months of February and March.

6. Before the assessor, objections or challenges to a name being put on the lists can be made, and he is bound to entertain those objections (for if he fraudulently places names on his assessment lists he is liable to indictment), and on the proper application and evidence he is bound to place names on his lists which have been omitted.

7. The levy court is bound to entertain applications for placing names omitted on the assessment lists, though it may not take any off which may have been returned by the assessor. So that here is time and place for guarding and scrutinizing.

8. The clerk of the peace is bound to "make and certify, for the use of the inspectors of the election, in the month of August in each year of the general election, an *alphabetical list* for each hundred and election district where a hundred is divided into more than one, of the names of all the free male citizens of the age of twenty-one years and upwards residing and assessed in such hundred or election district." He shall write the word "naturalized"

opposite the name of any one on said list who appears from evidence in his office to have been naturalized; and here by this officer is virtually made a registration of voters — a list making a *prima facie* case of right on the payment of tax — a list given to and used by the inspector of elections for that purpose, whose duty it is made to write the word “voted” opposite the name of *every one* who has voted.

It will be noticed that the clerk of the peace does not simply take from the assessment lists in his official custody the names of those assessed, but he also has to decide and fix on the residence of the persons on this list, and certifies the place of residence, as well as the fact of assessment, thus making a *prima facie* case of right to vote on the payment of a tax. Now this is not a complete registration or list of voters, because of the possible change of the residence of voters after the 1st of September or from other causes, but it is as complete as the clerk of the peace can make it, and is in close analogy, and, indeed, almost identical with lists of voters made out under a system of registry laws, *eo nomine*, which exists in Pennsylvania; the only substantial difference being that *there* the assessor makes out the list of voters from the *assessment* lists *he* has previously made, and here the clerk of the peace makes out the list of voters from the assessment lists which have been made by the assessors, perfected in the levy court.

Why is not this list made out by the clerk of peace such an one as should be guarded and scrutinized? It is made by a public officer, charged with the performance of a duty, who has office hours and a known place for the transaction of public business. If he is a dishonest and unprincipled man he has the means of perpetrating great frauds, and in no way more easily than by placing on this list of voters men who are not assessed.

We have argued this question hitherto on two grounds: *First*, that it was necessary to give such a construction to the term “registration of voters,” as used by congress, as to embrace the system of laws in the state of Delaware governing the assessment of her citizens, in order that the manifest intention of congress should be carried out; and, *second*, we have endeavored to show that while congress may have contemplated provisions of registry laws existing in other states, which have no existence here under our system, there still remains sufficient subject-matter to make the application of those laws simple, practicable and easy. Under these circumstances, unless I can find in the argument of counsel insuperable objections, I shall be compelled to give such a construction to our laws as to give them substantially the character of a registration of voters as contemplated by congress.

§ 12. *The registration contemplated by section 2011 is not such as shall be conclusive of the voter's qualifications.*

It is urged by both the counsel for the objectors that the registration of voters, to meet the requirements of the act of congress, must be a registration of voters “*qua* voters” or “as voters” alone, and one of counsel goes so far as to say it ought to be conclusive evidence of all the qualifications of the voters, or the act of congress would not embrace it as a “registration of voters.” This latter idea is thoroughly refuted by the settled practice and construction of the registration laws of Pennsylvania, which afford no conclusive evidence of a man's right to vote if upon it, or of the deprivation of a man's right if not on it, as will appear from Purdon's Digest of Pennsylvania laws, too voluminous to be here cited (see chapter “Elections,” Annual Digest for 1873-78).

§ 13. *Duties of clerks of the peace as to preparation of lists of voters. Preparation of such lists is substantially a registration.*

But have we not shown already that the clerks of the peace in each county, by authority of law, make up lists of voters *as such voters* affording *prima facie* evidence of the right to vote upon the payment of tax, for the use of the inspectors of election in each election district in the state? Can it be said that that is not a list of voters on which, by requirement of law, the word "voted" is to be marked opposite the name of every person who does vote; and when these lists are to be retained for the purpose of evidence of the fact of voting? An examination of the statutes hereinafter cited of the state of Delaware, referring to the action of the clerks of the peace in making out these lists, will show that he performs other than mere clerical duty in taking names from the assessment lists; in fact, some of them are *quasi* judicial, such as determining the fact of naturalization of foreigners, and determining and certifying to the residence of all persons assessed. They are in part as follows:

"Sec. 21. He shall make and certify under his hand and official seal, and deliver to the sheriff of his county, in the month of August in the year of holding the general election, an alphabetical list for each hundred, [and election district where a hundred is divided into two or more election districts] of the names of all the free white male citizens of the age of twenty-one years and upwards residing and assessed in such hundred [or election district]; and when it appears by any certificate recorded in his office that a person named in said list has been naturalized he shall write the word 'naturalized' opposite his name. If the general election be not held in any year on the same day as the election for electors of president and vice-president, he shall, in that year, make, certify and deliver two such lists.

"Sec. 5. The said alphabetical list shall be made and certified by the clerk of the peace of the county, under his hand and seal of office; and, as to every person whose name shall be contained in such list and who shall appear by any certificate recorded in the office of said clerk to be naturalized, the word 'naturalized' shall be distinctly affixed to the name of every such person. Such alphabetical list shall be delivered by the clerk of the peace to the sheriff on some day in the month of August next preceding the general election.

"Sec. 18. Each qualified elector shall deliver a single ballot, containing the names of the person voted for, to the inspector, who shall audibly pronounce the name of the elector, which shall be entered in words at length upon a list of polls to be kept by each of the clerks whom the judges shall direct to that duty, and one of the judges shall write against it, on the alphabetical list delivered by the sheriff to the inspector aforesaid, the word 'voted.' There shall be no examination of a ballot, except to determine that it is single; and the inspector shall, immediately after pronouncing the elector's name, put the ballot into the box in his presence, unless the vote shall be objected to.

"Sec. 33. Each inspector shall, on Thursday preceding the day of the general election, deliver into the office of the clerk of the peace of his county the oaths or affirmations that shall have been signed by the inspector and judges of the election in his hundred, and the certificate of said oaths or affirmations being administered, to be made and signed as directed in the thirteenth section, and the two lists of the polls kept at the election as before directed, and the alphabetical list aforementioned, with the notes of 'voted' as the same shall have been made thereon; all of which shall be filed in the

office of said clerk, and shall be public records, and as such admissible as evidence."

Now, on a comparison of the two systems of Pennsylvania and Delaware, in what respect does the Pennsylvania assessor present on his list of voters a stronger case of *prima facie* right to vote than does the clerk of the peace on his? By the former law the assessor makes out from his own assessment an alphabetical list of persons entitled to vote. By the law of Delaware the clerk of the peace makes out an alphabetical list from the lists of the county in his official possession of all freemen over the age of twenty-one years "residing and assessed in each hundred or election district." The assessor in Pennsylvania enters the letter "N" opposite the names of naturalized persons; the clerk of the peace writes the full word "naturalized" opposite the foreigner's name. The Pennsylvania assessor is required to write the word "vote," while the inspectors of election in Delaware write against each name the word "voted," as the act of voting takes place.

So it will be seen there is a great similarity between these two systems, and my last proposition on this subject is this: that if the test of the character of the list as made out by the clerk of the peace as a *list of voters* is the making a list presenting a *prima facie* right to every one on the list to vote on the payment of a tax, then that test is found as fully to exist in the lists made by the clerk of the peace as in the registration of voters made by the assessor under the Pennsylvania laws. But it has been argued by the objectors that even if these lists made out by the clerk of the peace were lists of voters, the guarding and scrutinizing must be confined to the action of the clerks of the peace; that it cannot be extended to the action of the hundred assessors or the action of the levy court.

The answer to this is a simple and easy one. The determination of the essential element of the right to vote, an indispensable prerequisite, viz., that of assessment by the constitution of the state, is primarily made by the assessor, and finally determined by the levy court in the completion of their assessment lists, and that determination, expressed by the act of assessment itself, becomes incorporated into and a part of that list of voters made out by the clerk of the peace. A denial, therefore, of the right to guard and scrutinize the action of the assessors and the levy court in that respect would be fatal to the right of the voter, as the period and opportunity would have passed by when he could claim his right to be assessed — the essential prerequisite, as before stated, of the exercise of the right of suffrage.

The attorney-general, Mr. Gray, assumes that we have no registration of voters within the meaning and intent of the act of congress, and then argues that the acts of the assessors and members of the levy court cannot be guarded and scrutinized under any of the provisions of section 2011, or congress would have added the comprehensive language of section 2005. But, as I have shown that we have in substance a registration law within the clear meaning and intent of the act of congress, the argument can have no application.

Both of the counsel contend that the lists in the hands of the assessors and in the hands of the levy court are not lists of voters, because in addition to the voters others are assessed, such as females and non-residents. Now, while it may not be a list containing all the qualifications of voters, it is a list which embraces the names of every one having the prerequisite qualification of assessment, an omission from which deprives one entitled to be on it of the

right of voting. It may not be, in the estimation of counsel, a list of voters, but it has this great significance of being such a list that any man not found upon it is deprived of his right to vote. Thus these lists have a dual aspect, and are as much a list of voters as of assessed persons. This supposed difficulty does not apply to the lists of voters made out by the clerks of the peace.

The learned attorney-general, whose opinion is entitled to great respect by reason of his official position and well known ability as a lawyer, has insisted that it would be impossible to enforce the criminal proceedings of the sections of the United States Revised Statutes regarding obstruction or hindrance of supervisors so appointed; holding that no indictment to cover such an offense could be drawn, because the warrant claimed for the authority of these supervisors cannot be found in the United States statutes. With all respect to the learned attorney-general, this is begging the whole question. If there is substantially a registration of voters in this state within the true meaning and intent of the act of congress, as we have already indicated there is, there would be no difficulty in framing an indictment against any state officer charged with the duties of registration of voters, either under the section in question or under section 2005, for any obstruction or hindrance to supervisors in the performance of the duties imposed on them by congress.

I have thus at some length argued the novel and interesting questions which have been presented for my solution. I may have erred in the conclusion at which I have arrived. If I entertained doubts of the correctness of my conclusion which were not of the gravest character, I should feel bound to give the benefit of those doubts in favor of that construction which was in good faith intended to purify and protect the elective franchise rather than that which would curtail and diminish the opportunity of doing the same. If I am right in my conclusion I would do a great wrong in not making these appointments, while, if I err in my legal judgment, no injury is done to any one—no man's rights are invaded or affected injuriously by the appointments,—and ample opportunity will be given, before a full bench, on full argument, to have this disputed question finally determined. I shall therefore make the appointments of supervisors of election as suitable names shall be presented to me by the chief supervisor of elections for this district.

EX PARTE GEISSLER.

(Circuit Court for Illinois: 9 Bissell, 492-498. 1890.)

STATEMENT OF FACTS.—Geissler, acting as supervisor of election under appointment by the circuit court, objected to the registration of a person offering himself, when one Dwyer, a bystander, interfered and an altercation took place between the latter and Geissler. Geissler ordered Dwyer to be silent, and called upon a policeman to remove him from the room. The policeman declined, when Geissler, who had declared that he would remove Dwyer if no one else would, seized him for that purpose, when he himself was arrested by the officer, and fined by a police magistrate for disorderly conduct. The case came up on a writ of *habeas corpus*.

§ 14. *Power of arrest by supervisors of election for breaches of the peace.*

Opinion by DRUMMOND, J.

The only question in the case is whether the petitioner was legally arrested, fined and imprisoned for the act which was done by him as it appears from the evidence before the court. The facts seem to be substantially these: That

the relator was appointed by this court a supervisor of election under the acts of congress, and qualified as such, and went before one of the boards of registration in the first ward of the city of Chicago, to discharge his duty as such, and remained there during the most of the day on the 26th of October. The registration took place in the usual way under the laws of the state, and about 8 or 8:30 o'clock in the evening a man, who called himself Miller, presented himself for registration, and some questions were put to him by the judges and answers made which threw some doubt upon his right to registration. They were of such a character as to induce the relator as supervisor to object to his registration, and in consequence of that an altercation arose between the supervisor and Dwyer, who came with Miller, as to his right to register. Dwyer claimed to vouch for Miller, and that he was entitled to registration. The supervisor insisted, on the other hand, that he was not.

There seems to be but little doubt that, prior to the act of violence which is complained of, there was offensive language used by both parties. The supervisor, while insisting that Miller should not be registered as entitled to vote, may have and perhaps did act in a manner somewhat offensive. He is obviously a man of quite excitable temperament—he showed that as a witness on the stand,—and it is possible, therefore, he did not act as discreetly and prudently as a man of different temperament would have done. It is also true, I think, that Dwyer became excited and used improper and, perhaps, opprobrious language to the supervisor; but it is to be recollected that while we can consider, for the purpose of determining what color is to be given to a transaction, the language which is used, we have to look at the acts themselves in order to determine whether they are legal. And we must consider the different relations of these two persons, who have both used violent language to each other, and to the circumstances of the case. Dwyer was a volunteer there. He was, so to speak, an outsider. He may have had the right to come in and give his testimony in favor of the person who was presenting his claims for registration; but Geissler was there clothed with the authority of law, and entitled to the protection of the law, as an officer of the United States. They therefore occupied entirely different positions.

I can have no doubt that, under the authority of the acts of congress, Mr. Geissler had the right, in the absence of the marshal and his deputies, as was the case here, to preserve order, and to arrest, without warrant or process, any person who interfered with him in the discharge of his duty as a supervisor. It was his right, among other things, to see that no person was improperly registered. He could, therefore, object, if the circumstances warranted it, to the registration of a person offering himself for registration; and that the circumstances did warrant it, is clear, because some of the judges themselves were in doubt as to his right, and therefore the objection of the supervisor was properly made.

There can be no doubt, either, that no person had a right to molest or interfere with the supervisor in the discharge of his duty, even by the use of offensive and opprobrious language. That, without any overt act, might be a molestation and interference with the supervisor in the discharge of his duty. Neither can there be any doubt that there was more or less disturbance and disorder, which followed the use of excited language. According to the weight of the evidence, as I understand it, the supervisor did tell Mr. Dwyer not to interfere, and “to stop” or “shut up,” or that he would be put out; to which Dwyer returned opprobrious language, threatening to strike the supervisor;

and thereupon, the supervisor having insisted that he should be removed or turned out, and saying that if no one else would do it he would himself, seized Mr. Dwyer, as some of the witnesses say, by the throat, and others say by the collar, or by the breast. It does not, perhaps, matter in what particular way. He did not strike Dwyer, and was himself immediately struck by Dwyer. The question is, whether what was done by the supervisor was in pursuance of his authority as an officer of the United States there present under the law.

I do not justify in all respects the manner of the action of the supervisor. It would have been much more creditable to him if he had shown more equanimity of temper; if he had not become so excited, and if he had not returned sharp, bad language to the same kind of language. But we must make allowance for the infirmities of human nature; and we cannot suppose that a man will always be unruffled when he is attacked, and when opprobrious language is used towards him. The question is, after all, had he the right to do what he did?

Had he the right to preserve order? Had he the right to arrest Dwyer? And was he in the discharge of his duty as a supervisor? And the fact that he may not have done it in such a quiet, smooth, regular sort of a way as other men of a different temperament, does not render the principal act illegal. In other words, if a man in arresting another, where he has the right to arrest him, pushes him with more force than perhaps may be necessary, it cannot, in general, affect the question of the legality of the arrest. So here it may be that the supervisor did not act as other men of a cooler temperament might have acted under the circumstances; but he had the right, I think, to arrest Dwyer, and to preserve order by removing him from the room. The difference between the two men, as I have stated, is that the one was an outsider and the other was clothed with the authority of the law.

§ 15. *The United States has a constitutional right to interfere whenever there is a registration of voters for election for members of congress. Its authority is then paramount.*

There seems to be some misapprehension in the public mind as to the rights of the officers of the United States in cases of this kind, as though they were interfering with the rights of the state or of the city. It is not so. The United States has the undoubted right to interfere in all cases where there is a registration of voters for an election of members of congress, and where that interference occurs under the authority of a statute of the United States, there can be no law which is paramount to it; and, as the supreme court of the United States has said, there is nothing in derogation of the rights of the states in this. *Ex parte Siebold*, 10 Otto, 371 (Const., §§ 326-43). We should move on harmoniously in the one case as in the other—each within its respective sphere—the United States as a national government, and the state as a government clothed with all the powers which affect us as individuals, our lives, our liberties, our property, our relations to each other as citizens of the state. But when the question of nationality and of the rights of the United States as a nation arises and has to be decided, then the national power and sovereignty override what is sometimes called the sovereignty of the state. Undoubtedly, therefore, the national government has the right to prescribe in what manner representatives in congress shall be elected, and how security is to be given to the rights of electors, in order to ascertain who are legally elected. So that, while I have criticised the action of the supervisor in the performance of his duty, as I think the circumstances warrant, and also the

conduct of those who interfered with him, still I must hold, under the law, that he was acting in the line of his duty, and that it was not competent for any state authority to interfere with him in the exercise of his right as a supervisor.

§ 16. *Act complained of was not an assault.*

The only question about which I have had any doubt since hearing the testimony in the case is, whether what the supervisor did could be treated as in the nature of a mere assault upon Dwyer, and not as an arrest. If it had been done without prior words and acts proved; if, for example, the circumstances which occurred prior to the seizure of Dwyer had not been as they were, namely, that he had requested Dwyer, no matter in what form of language, not to interfere in any way; that he had called upon others to put him out, or to arrest him, then it would have been different; but having done that—having said what he did—I must hold that the act which otherwise might have been merely an assault must be regarded simply as a seizure, with perhaps more violence than was necessary to remove the man from the room, because he said, “If no one else will remove him, I will do it.” The prisoner therefore will be discharged from custody.

IN RE DAVENPORT.

(Circuit Court for New York: 18 Blatchford, 336-343. 1890.)

STATEMENT OF FACTS.—John I. Davenport, chief supervisor of elections, issued the following instructions to the supervisors of election in the city of New York: “You will see to it that every applicant for registration who is possessed of a so-called certificate of naturalization purporting to have been issued from the supreme and superior courts in this city in the year 1868, unless the same was issued by the supreme court under date of October 6, 1868, and that day only, is notified that his said certificate is believed to be false and fraudulent, and, if he then persists in registering himself, you will challenge his right to register, and require the statutory oaths to be put to him. Upon such challenge, after the party is sworn, you will make of him the following inquiries: First. What was his age when he came to this country? Second. Whether he has served in the army and been honorably discharged? Third. Whether his parents or either of them have resided in this country, and if so, whether they are naturalized and the time of such naturalization, *i. e.*, whether they or either of them were naturalized before the applicant for registration arrived at the age of twenty-one. Fourth. If the answer to question 1 shows that the applicant for registration was over the age of eighteen when he came to this country, and the answers to questions 2 and 3 be in the negative, he should then be inquired of as to whether he procured his first papers before receiving his certificate, and if so, whether it was two years before. Fifth. Whether he personally appeared in court when he obtained his certificate and was sworn, or whether it was sent to him or given him elsewhere. Sixth. Whether he took a witness to court with him when he received his certificate, and, if so, how long he had known the person who was his witness. If the board of inspectors decide thereafter to register any such person, you will note your compliance with these instructions in your supervisor's book,” etc. . . .

“You are further directed: I. That whenever, upon your examination of any person applying for registration, it shall appear that such person has in

his possession a certificate of naturalization improperly issued or granted, or improperly obtained, you will see that such person is not allowed to register, and will take from him his certificate and attach thereto a statement of the facts as given by the applicant, together with his name and address, and return the same with your book to the assembly district aid, to be forwarded to the chief supervisor. II. It has come to the knowledge of the chief supervisor of elections that many persons possessed of fraudulent and void certificates of naturalization issued by the superior and supreme courts in the city of New York in the year 1868 have torn up or destroyed their certificates. Some of these persons have heretofore been allowed to register upon their claim to have been naturalized, but to have 'lost their papers.' Where a person seeks to be registered by reason of his having been naturalized, he must produce his certificate or be required to obtain a duplicate thereof. If, for any substantial reason, such as that the records of the court where the applicant was naturalized have been burned or otherwise destroyed, so that he cannot obtain a duplicate, then the evidence of any one who knows the fact of the naturalization of the applicant, or who has seen his certificate, may be received, but the court and the date of the naturalization, as nearly as possible, and the time and circumstances under which the certificate was lost, must be stated. III. Each supervisor will be careful to inspect each naturalization certificate presented, and observe its date as set forth in the forepart of the certificate. The date at the close is frequently the date of the issue of a duplicate, and you must be careful and not be misled by it." . . .

A motion was made to remove Mr. Davenport from office, as not being faithful and capable.

§ 17. *Instructions issued by chief supervisor to supervisors of election, relative to challenges, etc., commented on and approved.*

Opinion by BLATCHFORD, J.

We are prepared to dispose of this matter now. The two judges concur entirely in their views upon the subject, although the decision must be considered as being made by the circuit judge sitting alone, with the advice and concurrence of Judge Choate. We do not think a case is made out for removing Mr. Davenport under this petition. The instructions, so far as the substance and materiality of them are concerned—everything that precedes the second further direction—appear to be the same which were issued previously and approved, so far as such approval went, although *ex parte*, by the district attorney and by Judge Woodruff. Under such circumstances this court would not be authorized to say that the re-issuing of these instructions was evidence of want of fidelity or want of capacity on the part of the chief supervisor. Certainly these circumstances repel all imputations of any bad faith on his part, while at the same time they may not be conclusive upon this court, sitting judicially, as to the propriety of the instructions.

Now, as to the instructions themselves. The question of their propriety has been argued to us, and we have been asked to express an opinion in regard to them. The decision not to remove Mr. Davenport disposes, perhaps, of the prayer of the petition; but we deem it proper, in view of the questions involved and of the arguments of the counsel on both sides, to give our views upon the instructions, as the views of the court, without making any order whatever in the premises, except to deny the prayer of the petition for the removal of Mr. Davenport.

We regard the inquiries which the instructions direct shall be made of the

person presenting an 1868 certificate of naturalization as proper ones to be made. We do not understand that there is anything in these instructions which is intended to interfere, in any manner, with the proper prerogatives and duties of the inspectors. The inspectors are to decide whether the applicant is to be registered or not. If they refuse to register him, the remedy is by *mandamus* from the supreme court of the state; and, if they improperly put his name upon the registry, undoubtedly there is a remedy. We do not see anything in these instructions which in any manner militates against this proposition. If these inquiries, or any other inquiries, are asked of the applicant, and he refuses to answer one way or the other, the consequence will be that his name will not be registered. If he says that he will not answer the inquiries because the answers may tend to criminate him, that will make no difference. He does not answer, no matter what the reason is, and, if he says he will not answer, he assumes the consequence.

These instructions were made with reference to the registration and election laws of the state of New York, and we consider the inquiries or questions to be inquiries running *pari passu* with the questions which are authorized and required by those laws to be put to a person offering to vote as a naturalized person. The inspectors are not only required to put certain questions, but they are authorized to put such other questions as affect the right of the person to vote. Such is, also, the purport of the oath. The instructions direct the supervisor to challenge the right to register of a person who persists in registering on an 1868 certificate. We think sufficient is shown to warrant an inquiry into these 1868 papers. We cannot go behind the affidavit of Mr. Davenport. We have not the facts before us upon which he acted, and must take his affidavit upon that subject, as showing sufficient grounds for an inquiry in regard to persons offering to register on 1868 papers. The right of the supervisor to challenge any person offering to register is expressly given by the statute of the United States (§ 2017, Revised Statutes), and that statute (§ 2028) requires that the supervisor shall be a voter. The statute of the state gives the right of challenge to any voter.

§ 18. *Respective duties of supervisors and inspectors of election on registration.*

The instructions then direct the supervisor to require the statutory oaths to be put to the applicant. That is no more than asking the inspector to put the statutory oath. The inspector is the proper person to put the statutory oath, and he is, under the state law, required to do so. When the oath is put the applicant is to be examined. How is he to be examined? The state law provides that the inspector shall put the questions. These instructions say: "Upon such challenge, after the party is sworn, you will make of him the following inquiries." Farther on they say: "Whenever, upon your examination of any person applying for registration, it shall appear that such person," etc. It does not follow at all from this language that the questions are to be put directly by the supervisor to the applicant. They are to be put in the usual lawful way through the inspector. That is the meaning, although the language might be made more accurate. The inspector being, by law, the person who is to administer the oath and put the questions, may not put the questions proposed by these instructions. He may have his attention called by the supervisor to the advisability of putting these questions, and he may refuse to put them; but, nevertheless, they are proper questions for the supervisor to ask to have put.

The theory of the statutes of the state of New York in regard to registration is, that the right of a naturalized person to vote, even though he presents a certificate of naturalization, is to be inquired into by the inspectors; and there is nothing in the decision of this court in *In re Coleman*, 15 Blatch., 406 (CITIZENS, §§ 367-73), which conflicts or interferes with this view.

The instructions then proceed: "That whenever, upon your examination of any person applying for registration, it shall appear that such person has in his possession a certificate of naturalization improperly issued or granted, or improperly obtained, you will see that such person is not allowed to register," etc. That is not an instruction of prohibition. If the inspector is about to put down the name of the applicant as a registered voter, this instruction does not mean that the supervisor is to seize the pen and take it from the inspector's hand, and thus prevent the registering. It merely means that the supervisor is to use proper means to see that the inspector does not register the applicant. But, of course, the inspector may still register him. The form of expression is, perhaps, not as accurate as it might be, but at the same time it is a form not improper to have been used; and we do not understand that it conflicts in any manner with the freedom of action of the inspector.

§ 19. *Supervisors have no right to require surrender of alleged fraudulent certificates of naturalization.*

The instruction proceeds: "and will take from him his certificate and attach thereto a statement of the facts as given by the applicant, together with his name and address, and return the same, with your book, to the assembly district aid, to be forwarded to the chief supervisor." That portion of this instruction we regard as unwarranted and not to be supported. We regard it as tending to a breach of the peace, and as totally unauthorized under the circumstances in respect to which it is given. If a person is arrested under section 5022 of the Revised Statutes of the United States, by a deputy marshal or a supervisor, for illegally attempting to register, and, in connection with that arrest, the incriminating and inculpatory certificate is taken, together with the person, before a magistrate, that may be a proper proceeding, but it will be a very different proceeding. We do not think that the words "will take from him his certificate" are capable of the modified construction sought to be given to them by one of the counsel — that the supervisor is merely to receive the certificate if the person gives it up. It is capable of a different construction. Moreover, in the petition in this case it is stated that in several cases the certificate has been taken from the applicant, and on his demanding it back the supervisor has refused to return it. If it is submitted to the inspector and the inspector passes it to the supervisor, and the applicant then asks to have it returned to him, the withholding it then by the supervisor amounts to the same thing as if he had taken it forcibly from the applicant. We do not think that that portion of the instruction can be upheld.

In regard to the point raised by Mr. Wingate in his last observations to the court about the evidence to be submitted as to naturalization, either the original certificate or some substituted evidence, it would seem that, perhaps, the instruction goes a little beyond the intent of the state statute. The state statute seems to be that the applicant is to produce the original certificate of naturalization if he can, but that, if it is lost, he may show the fact of his naturalization by other evidence than the production of a duplicate of such certificate. This instruction seems to proceed upon the principle that the best attainable evidence must be produced, either the original certificate or a dupli-

cate. It says: "If, for any substantial reason, such as that the records of the court where the applicant was naturalized have been burned or otherwise destroyed, so that he cannot obtain a duplicate, then the evidence of any one who knows the fact of the naturalization of the applicant, or who has seen his certificate, may be received." This is stated as the opinion of the chief supervisor of elections. It may or may not be acted upon by the inspectors. It would seem, so far as the court now perceives, to be a departure somewhat from what is required by the state statute. We have not had an opportunity to examine it with care, and it has not been commented upon by the counsel for the chief supervisor. But the departure is not a very grave or serious one; and the matter is, unquestionably, to be regulated by the inspectors. If the supervisor sees fit to say to the inspectors, under these instructions, that the state law is so and so, and it is not, the inspectors know better, for they have the guidance of the state law, and of the instructions to them thereunder, and they will continue to act as they see fit. The instruction in question, though it may be erroneous, is not sufficient ground for removal, and does not require more serious comment.

These are our views on the subject, in which both judges concur. They cover the whole ground, and my associate Judge Choate says that he has nothing to add.

MCKAY v. CAMPBELL.

(Circuit Court for Oregon: 1 Sawyer, 374-382; 1 Abbott, 120-128. 1870.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—This action was commenced July 1, 1870, to recover a penalty of \$500 under and in pursuance of section 2 of "An act to enforce the rights of citizens of the United States to vote in the several states of this Union, and for other purposes," approved May 31, 1870. 16 Stat., 140.

Among other things it is alleged in the complaint that on June 6, 1870, as provided by law, a general election was held in the state of Oregon, and county of Wasco therein, at which a representative in congress, and also state and county officers, were voted for and elected, and that on said day, and long prior thereto, the plaintiff was a citizen of the United States, and a resident of East Dalles in said county and state, and legally entitled to vote at such election in the precinct aforesaid for all such offices. That on said day defendant was acting as judge of election in said precinct, in conjunction with George Corum and Thomas M. Ward, and as such judge was required by law to receive votes from the electors, and perform other duties required by law of such an officer; and that on said day the plaintiff appeared at the polls in said precinct and offered his vote for Joseph G. Wilson, as a representative in congress, and for Joel Palmer for governor of Oregon, and for others for different state offices, and for John Darrah for sheriff of said county, and for others for the different county offices; and that "the defendant, combining with the other said judges, unlawfully and wrongfully prevented him from voting; that defendant, confederating with said Ward and Corum, unlawfully and wilfully refused his vote—refused to swear him to his qualification as an elector—refused to enter his name on the poll books of said precinct, and refused to enter on record in said book his vote for the different candidates for whom he proffered to vote. All of which duties, though required of him by the laws of Oregon, he, the defendant, wrongfully and wilfully failed and

refused to do, though requested to do so by plaintiff; that defendant with said Ward and Corum ordered him away from said polls, and deprived him of his right as a citizen to vote, to his damage. By reason of which unlawful acts of said defendant, so acting and combining with said others, plaintiff has suffered damages; and he, defendant, forfeited and became liable as provided by law to pay said plaintiff therefor the sum of \$500, for which sum, with costs and allowances as provided by law, plaintiff now asks judgment of the court."

On July 8th the defendant demurred to the complaint and for cause of demurrer alleged: I. That it did not state facts sufficient to constitute a cause of action. II. That several causes of action have been improperly united therein.

On August 2d and 3d the demurrer was argued by counsel and submitted.

§ 20. *Under the code of Oregon the proper remedy in case of duplicity is a motion to strike out the pleading, and not a demurrer.*

Duplicity in pleading, or the statement of more than one sufficient matter as a ground of action or defense thereto in the same count or plea, is forbidden by the common law and the code as tending to useless prolixity and confusion. 1 Chitty's Plead., 259; Gould's Plead., 220; Or. Code, 157, 161, 163. Duplicity in pleading being, however, only an error in form, at common law the objection had to be made by special demurrer. Chitty's Plead., 701; Gould's Plead., 466. The code having practically abolished special demurrers except in the instances enumerated in title VIII of chapter I, has substituted the motion to strike out for the special demurrer in the case of duplicity in pleading. It provides, section 103: "When any pleading contains more than one cause of action or defense, if the same be not pleaded separately, such pleading may, on motion of the adverse party, be stricken out of the case."

For these reasons I conclude that as to the second ground stated, this demurrer is not well taken, and that the objection should have been made by a motion to strike out the complaint.

§ 21. *A complaint alleging in one count a refusal to allow the complainant to vote for any of the candidates for several distinct offices is bad for duplicity.*

As this demurrer must be sustained upon the ground that the complaint does not state facts sufficient to constitute a cause of action, it may be well enough to briefly consider the question of duplicity in the complaint, so that the plaintiff, if he desires to amend, may frame his amended complaint accordingly. The complaint contains but one count or statement of a cause of action, but it is alleged therein that the defendant, in conjunction with the other judges of election, unlawfully and wrongfully prevented the plaintiff from voting for representative in congress, and for governor of the state of Oregon, and for other state officers, and for sheriff of the county, and for other "county offices."

Now, if it was lawful to prevent the plaintiff from voting for any one of the candidates for these several offices, that, it appears to me, is a separate and distinct cause of action, and should have been separately stated. But the complaint alleges, not only that the defendant prevented the plaintiff from voting for a certain candidate for each of these offices, but that the defendant unlawfully and wilfully refused his vote — refused to swear him as to his qualifications as an elector — refused to enter his name on the poll books — refused to enter his vote, etc. Here are four different acts, in addition to the first one stated, alleged to have been committed by the defendant, each of which are assumed by the pleader to be a distinct violation of the act of congress, and consequently

a separate cause of action. If so, they should have been stated or pleaded separately so as to avoid the prolixity and confusion necessarily resulting from jumbling them together in one count or statement.

§ 22. *Duties of officers of election under section 2 of the act of May 31, 1870.*

It is a question, whether some of these alleged refusals are sufficient to support an action for the penalty given by the act. It does not appear that the penalty given by section 2 of the act is given for preventing a person from voting or for refusing to receive or record a vote, but for refusing or knowingly omitting to give full effect to such section. Now, this section substantially provides, that if the law of the state requires any act to be done as a prerequisite or qualification for voting, and, by such law, officers are charged with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, it shall be the duty of such officers to give to all citizens of the United States an equal opportunity to perform such prerequisite and become qualified to vote without distinction of race, color or previous condition of servitude.

What amounts to a refusal or wilful omission to give effect to this section upon the part of the state officers depends upon the duties imposed upon these officers in this respect by the law of the state. Upon examination, it does not appear that the section commands these officers to admit or permit citizens of the United States "to vote without distinction of race, color or previous condition of servitude," but to only give such citizens an equal opportunity to become qualified to vote according to the law of the state, and to perform any act which the law of the state may require as a prerequisite—a condition precedent—to voting. The duty which this section enjoins upon the officers is something or anything which the state law requires the officer to do, so as to enable the citizen to qualify himself to vote, and from the nature of things it must precede in point of time and order the act of voting, or anything subsequent thereto. If these suggestions be sound, then none of the acts complained of by the complaint are within the purview of the section, except the refusal to swear the plaintiff to his qualifications as an elector.

§ 23. *Duties of judges of election in Oregon in case of a challenge.*

The law of this state provides (Or. Code, 700) that: Sec. 13. If any person offering to vote shall be challenged as unqualified, by any judge or clerk of the election, or by any other person entitled to vote at the same poll, the judges shall declare to the person so challenged the qualifications of an elector; if such person shall then state himself duly qualified, and the challenge shall not be withdrawn, one of the judges shall then tender to him the following oath: You do solemnly swear, etc. (to the effect that the affiant had all the qualifications necessary to authorize him to vote at that poll). And if any person so challenged shall refuse to take such oath so tendered, his vote shall be rejected. Sec. 14. If any person so offering such vote shall take such oath, his vote shall be received, unless it shall be proven by evidence satisfactory to the majority of the judges that he does not possess the qualifications of an elector, in which case a majority of such judges are authorized to reject such vote.

It seems to me, that whenever a person offering a vote is challenged, that it then becomes necessary that he should take this qualifying oath before he can be said to be qualified to vote. By the interposition of the challenge it becomes incumbent upon him to perform this prerequisite, to entitle himself to vote. But he cannot take this oath and perform this prerequisite without

the judges shall furnish him an opportunity so to do. Therefore, the law of the state makes it the duty of the judges, or one of them, to tender and administer the oath to him. Then comes the law of congress and makes it the duty of the judges to give to all citizens, "without distinction of race, color or previous condition of servitude," the same and equal opportunities to perform this prerequisite—to take this oath—and thereby become qualified to vote. It follows, that a refusal or omission to furnish this equal opportunity to any person seeking to vote, on account of either race, color or previous condition of servitude, is a violation of the act.

As to the first ground of demurrer, I think it well taken. The complaint does not state facts sufficient to constitute a cause of action.

§ 24. *Act of May 31, 1870, and the fourteenth and fifteenth amendments, considered.*

The act of congress upon which this action is brought provides for enforcing the amendment to the constitution which declares:

"Art. 15, sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color or previous condition of servitude.

"Sec. 2. Congress shall have power to enforce this article by appropriate legislation."

The act also regulates the elections of representatives in congress, in pursuance of section 4 of article 1 of the constitution, which declares:

"The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the place of choosing senators."

Sections 2, 3 and 4 of the act which relate to the enforcement of the amendment to the constitution give penalties, to be recovered by civil action, against persons who violate them, but violations of that portion of the act regulating the election of representatives in congress are only punishable by indictment or information.

In considering the sufficiency of the complaint, therefore, in this action, no special significance can be given to the fact that the plaintiff offered to vote for a candidate for representative in congress.

By the fourteenth amendment to the constitution it is declared that:

"Art. XIV, sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." . . . This clause of this amendment declares who are citizens of the United States and of the several states respectively. The fifteenth amendment above quoted declares in effect that citizens of the United States and of the several states shall vote in their respective states at all elections by the people, without distinction on account of race, color or previous condition of servitude. But the amendment does not take away the power of the several states to deny the right of citizens of the United States to vote on any other account than those mentioned therein. For instance, notwithstanding the amendment, any state may deny the right of suffrage to citizens of the United States, on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime, etc. The power of congress in the premises is limited to the scope and object of the amendment. It can only legislate to enforce the amendment, that is, to secure the right to citizens of the United States to vote in the several states

where they reside, without the distinction of race, color or previous condition of servitude. And this appears to be the intention of the act, so far as it relates to the enforcement of the amendment.

Section 1 declares, in effect, that all citizens of the United States, being otherwise qualified by law, shall be allowed to vote at all elections by the people in any state, district, etc., without distinction of race, color or previous condition of servitude.

Section 2 declares, in effect, that officers of the state shall furnish all citizens of the United States with the same and equal opportunities to become qualified to vote, without distinction of race, color or previous condition of servitude.

True, the language of sections 4 and 5, particularly the former, if taken literally would apply to acts and proceedings intended to prevent citizens of the United States from voting, whether the same were done or carried on on account of the race, color or previous condition of servitude of the citizen in question or not. But they ought to be construed so as to harmonize with the unambiguous sections which precede them, and must, in any view of the matter, be construed so as to have effect only within the limits of the power conferred by the amendment on congress over the subject.

§ 25. *Proof required to sustain an action against a judge of election to recover the penalty prescribed by section 2 of the act of May 31, 1870.*

Upon this construction of the act, to maintain this action I think it would be necessary to prove on the trial:

I. That the plaintiff was a citizen of the United States and otherwise qualified to vote at the time and place mentioned in the complaint.

II. That the defendant refused or knowingly omitted to furnish the plaintiff an opportunity to become qualified to vote, as by refusing or knowingly omitting to swear the plaintiff to his qualifications as an elector, when the law of the state made it his duty so to do, and that such refusal or omission was on account of the race, color or previous condition of servitude of the plaintiff.

If it be necessary to prove these facts to maintain this action, they ought to be alleged in the complaint.

§ 26. *Whether the refusal of a judge of election to allow a voter to establish his qualification as an elector was in consequence of the voter's race, color, etc., is a question of fact for the jury.*

Now the complaint is silent as to the reason of the defendant's refusal or omission to swear the plaintiff as to his qualifications as an elector. It may have been for some other reason than on account of his race, color or previous condition of servitude, and then the plaintiff's remedy, if any, would be found under the state law and in the state tribunals. I know it may be said with much probability that disingenuous judges of election who are violently averse to and prejudiced against the amendment and the act may refuse or omit to allow a citizen to qualify himself to vote, ostensibly for some reason not within the purview of the act, but really and in fact on account of his race, color or previous condition of servitude. But this is a question of fact, and if the evidence is sufficient the jury will be bound to disregard the pretenses of the defendant and find according to what appears to have been the fact. Besides, to prevent a failure of justice on this account, it may be necessary and proper to hold in this class of cases, as in many others, that slight proof on the part of the plaintiff as to the reason of the defendant's refusal or omission is sufficient to throw the burden of proof in this respect upon the latter. The demurrer must be sustained.

§ 27. **Right to vote, not a natural right.**—The right to vote is not a natural right existing in all persons, but is the creature of the law which defines the qualifications of those who may exercise it. *Spencer v. The Board of Registration*,* 1 MacArth., 169.

§ 28. — **is derived from state alone.**—The right to vote is not an inherent right but a conferred privilege. It is not derived from the United States, but from the state alone. It is not a right derived from citizenship in the United States, and states may abridge it in any other respect than on account of race, color or previous condition of servitude. (Per HUGHES, D. J.) *United States v. Petersburg Judges of Election*, 1 Hughes, 493. See §§ 34-38.

§ 29. — **not guaranteed by fourteenth amendment.**—The right or privilege of voting is a privilege arising under the constitution of the various states, and not under the constitution of the United States, and is not within the provisions of the fourteenth amendment, which forbids any state to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." So where a female who possessed all the qualifications of an elector, except the sex, required by the constitution of the state in which she voted, voted for a member of congress, it was held in a prosecution against her for illegal voting under the nineteenth section of the act of May 31, 1870, that the provision of the state constitution limiting the right of suffrage to males was not a violation of the clause of the fourteenth amendment above referred to. *United States v. Anthony*, 11 Blatch., 200. See §§ 34-38.

§ 30. — **how affected by constitution of the United States.**—The right of a citizen to vote depends upon the laws of the state in which he resides, and is not granted or guaranteed by the constitution of the United States. All that the constitution of the United States guarantees is that no person shall be deprived of his right to vote by reason of his race, color or previous condition of servitude. *United States v. Crosby*, 1 Hughes, 448 (CRIMES, §§ 2285-89).

§ 31. Any law of congress is unconstitutional which makes penal the preventing of a voter from voting in a state election on any other account than of race, color or previous condition of servitude. (Per HUGHES, J.) *United States v. Petersburg Judges of Election*, 1 Hughes, 493.

§ 32. — **may exist without citizenship.**—The right to vote may exist without citizenship, and the fact that the constitution of a state gives foreigners who have declared their intention to become citizens the right to vote does not confer citizenship upon them. *Lanz v. Randall*, 4 Dill., 425.

§ 33. The right of suffrage is not one of the privileges of citizenship. *Minor v. Happersett*, 21 Wall., 162 (CONSTR., §§ 806-15). See §§ 36-38.

§ 34. — **as affected by national citizenship.**—The right of suffrage is not a necessary attribute of national citizenship, but exemption from discrimination in the exercise of that right on account of race, color, etc., is. The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the constitution of the United States; but the last has. *United States v. Cruikshank*, 2 Otto, 542 (CONSTR., §§ 898-911). See §§ 29-31.

§ 35. — **not conferred by fifteenth amendment.**—The fifteenth amendment to the constitution of the United States does not confer the right of suffrage. It simply protects citizens in the exercise of that right from discrimination on account of race, color or previous condition of servitude. The power of congress to punish persons for refusing to receive the votes of qualified voters exists only in case such refusal is on account of race, etc., and as sections 3 and 4 of the enforcement act of May 31, 1870, are not confined to cases in which the refusal was for that reason, they are unconstitutional. *United States v. Reese*, 2 Otto, 214 (CONSTR., §§ 1568-86).

§ 36. — **properly confined to men.**—The constitution and laws of the several states which confine the right of suffrage to men are not void as being in violation of the constitution of the United States, as that instrument does not confer the right of suffrage upon any one. *Minor v. Happersett*, 21 Wall., 162 (CONSTR., §§ 806-15). See §§ 37, 38.

§ 37. **Women not entitled to vote under constitution of United States.**—The constitution of the United States does not recognize the right of suffrage in women. The duty of the United States to guaranty to each state a republican form of government does not secure to women the right of suffrage, and the exclusion of women from that right is not a deprivation of life, liberty or property without due process of law. *Ibid.* See §§ 29-33.

§ 38. — **not conferred by fourteenth amendment.**—Only male citizens can vote at elections for delegates in congress in the District of Columbia. The fact that a woman is, under the fourteenth amendment, a citizen of the United States does not, in the absence of legislation to that effect, confer upon her the right to vote. *Spencer v. The Board of Registration*,* 1 MacArth., 169.

§ 39. **Elections of members of congress — Congressional control over.**—Section 2 of article 1 of the constitution of the United States confers upon electors qualified by state law to vote for members of the most numerous branch of the state legislature the right to vote for

members of congress. This section was intended as a declaration as to who of the people of the states should have the right to vote for representatives in congress. And as the right to vote for members of congress is conferred by the constitution of the United States, congress has the power to protect voters in the exercise of that right. Sections 1 and 4 of the same article are intended to place the election of representatives in the ultimate power of congress, so as to secure at all times a house of representatives both by preventing obstructive legislation by the states and by securing to the voter the protection of the general government. *United States v. Goldman*, 3 Woods, 187 (CRIMES, §§ 2290-93).

§ 40. — **protection of voters.**— Under the power conferred upon it by the constitution to provide for the manner of holding elections for members of congress, congress has the right to protect a voter in making his choice, and in afterwards expressing his choice at the polls. Any interference with the right of an elector to make up his mind how to vote is as much an interference with his right to vote as if he were prevented from depositing his ballot in the ballot-box after having made up his mind. *Ibid.*

§ 41. — **conduct of deputy marshals.**— Congress, by virtue of the authority conferred upon it by the constitution to regulate the manner of holding elections for members of congress, has authority to provide for the appointment of special deputy marshals to attend the election of representatives and delegates in congress, and may properly define their duties and require them to keep the peace and preserve order at the polls. *In re Engle*, 1 Hughes, 593 (CONSTR., §§ 349-53). See §§ 53, 54.

§ 42. — **control over state officers of election.**— Under the power conferred upon congress to regulate the election of its members it has the power to punish delinquencies of officers of election appointed under its authority; to punish those who attempt to interfere with such officers in the exercise of their duties, and it may also impose additional penalties for the prevention of frauds committed by state election officers, or for their violation of any duty relating thereto, whether arising from the common law or any statute, state or national, even though such state election officers are also amenable to the state laws. *Ex parte Siebold*, 10 Otto, 371 (CONSTR., §§ 326-43); *Ex parte Clarke*, 10 Otto, 399 (CONSTR., §§ 344-48). See §§ 8, 57-59.

§ 43. The power of congress to regulate the election of its members is not exclusive of regulation thereof by state authority. Regulations of such elections may be made by state and national authority concurrently, the regulations of the latter being paramount. *Ex parte Siebold*, 10 Otto, 371 (CONSTR., §§ 326-43). See § 3.

§ 44. — **Louisiana statute.**— The statute of Louisiana of April 11, 1877, did not authorize the commissioners of election to employ a separate ballot-box for state and parish officers, and another ballot-box for members of congress. *United States v. Nicholson*, 3 Woods, 215.

§ 45. **Supervisors of election, congress may provide for.**— Congress has the power to provide as it has done for the appointment of supervisors of election by the circuit courts of the United States. *Ex parte Siebold*, 10 Otto, 371 (CONSTR., §§ 326-43).

§ 46. The act of congress directing the appointment of supervisors in congressional elections by the circuit judge of the United States for the circuit in which the election is to be held, when properly requested, is constitutional. *In re Citizens of Cincinnati*, 2 Flipp., 228.

§ 47. — **rule for appointment.**— In appointing supervisors of elections from a given political party, when the question arises what political organization should be recognized as the regular representative organization of that political party, it should be decided by recognizing that one which was recognized by the last state convention of the party; but where it appears that such organization, since the last state convention, has regularly taken such action that, though it still formally exists, a new organization must be regarded as representing it and its members, then such new organization should be recognized as the regular organized representative of that party. *In re Appointment of Supervisors of Election*,* 9 Fed. R., 14.

§ 48. — **character and duties.**— A supervisor of election appointed under the act of congress is an "officer of an election" within the meaning of that term as used in section 5515. Duties of supervisor of elections enumerated. *United States v. Fisher*, 8 Fed. R., 414 (CRIMES, §§ 349, 350). See §§ 4-7.

§ 49. Supervisors of election appointed in a state under the act of congress of June 10, 1872, have no authority to supervise or report upon the election of state officers. No return made by them in relation to the election of a state officer can have any official sanction or be received as evidence. *Harrison v. Hadley*, 2 Dill., 229 (COURTS, §§ 1596-1604).

§ 50. **Chief supervisor—Power.**— The chief supervisor of elections has no power to administer oaths. *Muirhead v. United States*,* 13 Ct. Cl., 251.

§ 51. — **fees.**— Under section 2031, Revised Statutes of the United States, the chief supervisor of elections is not entitled to fifteen cents per folio for each copy of printed instructions prepared and furnished by him to his subordinates, and the copy filed by him in his office. *Ibid.*

§ 52. A United States commissioner is entitled to no fees for affixing his seal to an oath of a supervisor or deputy marshal of election, though he is also chief supervisor of elections. *Ibid.*

§ 53. Deputy marshals of election — Duties. — Unless it is shown that a disturbance of the peace has actually occurred, or violence is committed, or that one or the other is threatened, or that actual fraud is attempted, or that the supervisor is in actual need of protection in the room of the judges of election, the deputy marshals of election have no right to be in the said room during the progress of the voting. But if there be actual disturbance of the peace, or other actual violence committed or threatened, or if the supervisor be in actual need of protection, or fraud be attempted in said room, then the deputy marshal may enter the room for the purpose of discharging the duties imposed upon him by section 2022, Revised Statutes of the United States. *United States v. Gitma*,* 3 Hughes, 549. See § 41.

§ 54. It is the duty of a deputy marshal of election to preserve order and keep the peace at the polls, and, also, to prevent fraudulent voting. It is therefore proper for such a marshal to arrest a person who is intoxicated at the polls, and who, in his opinion, is likely to create a disturbance. He may also arrest a person distributing ballots calculated to deceive ignorant voters. *In re Engle*, 1 Hughes, 592 (CONSTR., §§ 349-53).

§ 55. Judges of election, criminal liability. — Judges of election are not liable to criminal prosecution, unless they have acted from a corrupt motive. *United States v. Gillis*, 2 Cr. C. C., 44. See § 8.

§ 56. Judges of election in Virginia are not justified in refusing the vote of a person because his capitation tax has been paid by another, nor because the receipt is signed by the clerk of the auditor instead of by the auditor. But in order to convict judges of election for refusing voters the right to vote on these grounds, under section 5515, Revised Statutes, it must be shown that the refusal to receive such votes was done with an improper motive. *United States v. Foster*, 4 Hughes, 514; 6 Fed. R., 247 (CRIMES, §§ 340-343). See §§ 29, 53, 75-77.

§ 57. Inspector of election — Acts held not criminal. — The fact that an inspector of an election, on the morning of election, delivered the key to the ballot-box to the policeman assigned to duty at the polls, when such was shown to have been the custom, and was supposed, though erroneously, to be under the authority of the police laws of the city in which the election was held, will not, in the absence of improper motives on the inspector's part, be held to constitute him guilty of a criminal offense. *United States v. Hayden*,* 52 How. Pr., 471. See § 42.

§ 58. A failure of inspectors of an election to canvass the votes in the different ballot-boxes, in the order required by the laws of the state in which the election was held, will not, in the absence of improper motives, be held to constitute a criminal offense. *Ibid.*

§ 59. To warrant the conviction of an inspector of elections for making a false certificate of the result of a canvass for election of a member of congress, it must appear that such certificate was made by such inspector fraudulently. The fact that a fraud was committed is insufficient, if it is not shown that the inspector was concerned therein. *Ibid.*

§ 60. Enforcement act, scope and purpose of. — The scope of the enforcement act of May 31, 1870, so far as elections are concerned, extends from the first act required to be done in the matter of an election down to and including the final and effective canvass of the votes by the officers who are charged with the duty of determining and certifying the result. If in any stage of an election, in registration, in the receipt of votes, the certificates of the votes by the local authorities, or the final canvass of the votes, or the certificate of election by the returning board, there has been a denial of the right to vote on account of race, etc., then the question of the right of a person to office could be passed upon by the federal courts. But the jurisdiction of the federal courts begins and ends with a denial of the right to vote on that ground. After a person has once been installed in office the jurisdiction ceases. *Johnson v. Jumel*, 3 Woods, 69 (COURTS, §§ 1594-95).

§ 61. The purpose of the passage of the enforcement act of May 31, 1870, was to maintain as near as possible the purity of elections in securing to every qualified voter under the law of the state, the right to register, when the same is a qualification for voting, and also the free exercise of the right of suffrage. The act does not repeal or interfere with the laws as they exist in the states unless they are in conflict with its plain provisions, and then only so far as such conflict exists. It is remedial in its character, and is supposed to be in harmony with the laws of the state, but is intended to furnish full and adequate protection to all qualified voters when the state laws are inadequate, by enforcing their right to vote. *Enforcement Act*, 2 Hughes, 518.

§ 62. The provisions of the enforcement act of May 31, 1870, apply to all citizens and protects equally the rights of all citizens to vote whether white or colored. *Ibid.*

§ 63. — various sections construed. — No person other than a citizen of the United States can maintain an action under section 2 of the enforcement act of May 31, 1870, to recover the

penalty imposed by that section upon officers of election for refusing to swear such person as to his qualifications as an elector, on account of his race, color or previous condition of servitude. *McKay v. Campbell*, 2 Saw., 118 (CITIZENS, §§ 10-17). See § 8.

§ 64. The provisions of the third section of the enforcement act of May 31, 1870, are mandatory and constitute those who offer to vote under it the sole judges of their right to do so, leaving the officers, who are ministerial and in no wise judicial, the exercise of no discretion whatever. Enforcement Act, 2 Hughes, 518.

§ 65. In an action to recover the forfeiture imposed by section 4 of the act of May 31, 1870, for preventing a person from voting at an election, it must appear that the plaintiff was prevented by force, bribery, threats, intimidation or other unlawful means. And an action under that section against a superintendent of the poll is not sustainable when it appears that the plaintiff was prevented from voting by the superintendent's erroneous decision upon a question of law, where the decision was not wilfully and maliciously wrong. *Seeley v. Koox*, 2 Woods, 368.

§ 66. An inspector of a municipal election cannot be punished under sections 8 and 4 of the enforcement act of May 31, 1870 (16 Stat., 140), for refusing to receive and count at such election the vote of a citizen of the United States on the ground that he is of African descent, for the reason that such law was invalid and not "appropriate legislation" within the meaning of the fifteenth amendment. *United States v. Reese*, 2 Otto, 214 (CONSTR., §§ 1568-86).

§ 67. A person is prevented from freely exercising the right of suffrage, within the meaning of that phrase as used in section 19 of the enforcement act of May 31, 1870, when he is driven from the polls by violence, though he may afterwards return and vote. *United States v. Souders*, 2 Abb., 456 (CRIMES, §§ 354-361).

§ 68. The twentieth section of the act of May 31, 1870, which declares that a fraudulent registration or a fraudulent attempt to register for the purpose of voting for a representative or delegate in congress is a crime against the United States, is valid. It does not affect the qualifications of electors under state laws in any way. *United States v. Quinn*, 8 Blatch., 48.

§ 69. The governor of a state is not an officer of election within the meaning of the twentieth section of the enforcement act of May 31, 1870, and is not liable under that section for issuing a certificate of election to a person as member of congress. *United States v. Clayton*, 2 Dill., 219 (CRIMES, §§ 344-348).

§ 70. Federal control over officers, etc., of election.—The fact that by the law of Alabama the inspectors of elections are the custodians of ballot-boxes, ballots, poll lists, inspectors' returns and other papers relating to elections, does not place such boxes, ballots, etc., beyond the reach of a federal court having jurisdiction to punish offenses against the elective franchise. *Ex parte Turner*, 3 Woods, 608.

§ 71. Registrars and poll-holders of an election will not be enjoined from proceeding with an election held pursuant to state legislation for municipal officers, even though such legislation has discriminated wrongfully against the colored voters of such municipality, and it is alleged that there is danger of disorder and confusion arising from contests among contending sets of municipal officers. *Holmes v. Oldham*, 1 Hughes, 76.

§ 72. Offenses against election laws.—Interfering with ballots.—It is an offense, under section 5511 of the Revised Statutes of the United States, which punishes any person for interfering in any manner with any officer of an election in the discharge of his duties, for a supervisor appointed under act of congress to mix a quantity of spurious ballots with the ballots actually voted. *United States v. Fisher*, 8 Fed. R., 414 (CRIMES, §§ 849, 850).

§ 73. — acts improperly affecting result.—In a prosecution under section 5515, Revised Statutes, against officers of election for acts improperly affecting the election of a member of congress, it must appear that the acts charged affected the result, and were done knowingly and with the intent that they should do so. *United States v. Nicholson*, 3 Woods, 219. See § 75.

§ 74. — refusing to answer inquiries as to residence.—In an indictment under section 5523, Revised Statutes of the United States, for refusing to answer the lawful questions of a supervisor of election who was engaged in verifying a registration list, it must be alleged that such inquiries were made of the defendant at the place stated by him to be his place of residence at the time of registration. *United States v. Davis*, 6 Fed. R., 683.

§ 75. — voting without qualifications.—In order to sustain an indictment under section 5511 of the Revised Statutes of the United States, for voting without a legal right to do so, it must appear that the attempt was made "knowingly." *United States v. Watkinds*, 7 Saw., 85. See §§ 55, 56, 78.

§ 76. The fact that a person voting at an election supposed he had a right to vote is no defense to a prosecution for illegal voting. *United States v. Anthony*, 11 Blatch., 300.

§ 77. The mere fact that a person voted upon a certificate of naturalization which was regular upon its face, but was in fact issued without his presence in court or his oath, is not suffi-

cient to warrant his conviction under section 5426 of the Revised Statutes of the United States. *United States v. Burley*, 14 Blatch., 91.

§ 78. — *refusing to register voter.*—An indictment for refusing to register, or for preventing from voting, certain persons of African descent, is bad unless it charges that such acts were done on account of the race, color, etc., of the voters. (Per HUGHES, J. *BOND*, C. J., *contra.*) *United States v. Petersburg Judges of Election*, 1 Hughes, 493. See §§ 84, 85.

§ 79. — *violation of state law.*—Section 5515 of the Revised Statutes of the United States, relating to the punishment of officers of elections for certain acts enumerated therein, was not intended to punish such officers for a violation of the state law relating to elections, except so far as such acts affect the election or the result of the election for a member of congress. *United States v. Nicholson*, 8 Woods, 215.

§ 80. — *conspiracy.*—It is an offense under section 1 of the enforcement act of May 31, 1870, for persons to conspire either to prevent a person from voting freely at an election to be held in the future, or to oppress him for having voted at an election in the past, and it is not necessary that the sole object of the conspiracy should be either of these unlawful purposes; it is sufficient if either is found to have been one of the purposes. *United States v. Mitchell*, 1 Hughes, 439 (CRIMES, §§ 180-82).

§ 81. In an indictment under section 7 of the enforcement act of May 31, 1870, for conspiring to prevent and hinder certain persons from voting on account of their race, color or previous condition of servitude, it is not necessary to give the names of the persons hindered and prevented. The offense was committed when the conspiracy was formed, though no one was hindered or prevented. *United States v. Crosby*, 1 Hughes, 448 (CRIMES, §§ 2285-2289).

§ 82. On an indictment for conspiring to prevent persons of African descent from freely exercising the right of suffrage, it must appear that the intent of the conspirators was to prevent such persons from exercising their right to vote on account of their race, etc., and that it was on that account cannot be inferred from the fact that the persons prevented were of African descent. *United States v. Cruikshank*, 2 Otto, 542 (CONSTR., §§ 898-911).

§ 83. On indictments, under sections 5508 and 5520, Revised Statutes of the United States, for conspiring to oppress any citizen in the enjoyment of his rights, or because he has exercised any right, and for conspiring to oppress him in the enjoyment of his right to vote for a member of congress or because he has exercised such right, it must appear that such oppression was to be on account of race, color, etc.; that the person claimed to be oppressed was lawfully entitled to the rights in the exercise of which and on account of which he was oppressed; that the conspiracy was for that purpose, and under the latter section, that the person to be voted for was a qualified member of congress. It is not essential that the conspiracy should be formed against the person named alone. It is sufficient if he was included with others, or that he was one of a class against whom the conspiracy was directed. *United States v. Butler*, 1 Hughes, 457.

§ 84. *Voters, disqualification, conviction of felony.*—Under the constitution of Oregon, which provides that the right to vote shall be forfeited upon "a conviction of any crime which is punishable by imprisonment in the penitentiary," it was held that such right was forfeited by a conviction of an offense for which the offender might have been sent to the penitentiary, though in fact a lighter sentence was actually imposed, as might be done under the law. *United States v. Watkins*, 7 Saw., 85.

§ 85. Under the law of New York, providing that a person who has been convicted of an infamous crime, deemed by the laws of that state to be a felony, shall be disqualified to vote, a person is not disqualified by reason of a conviction in a federal court of an offense created by act of congress. *United States v. Barnabo*, 14 Blatch., 74 (CRIMES, §§ 338, 339).

§ 86. — *residence.*—An unmarried man, who resided in New York city, went to Brooklyn for the purpose of enlisting as a marine, intending to return if unsuccessful. He enlisted, and continued to reside in the marine barracks at the Brooklyn navy yard. Held, that he was not entitled to vote in Brooklyn, for the reason that the constitution of New York required a residence of thirty days within the election district, as a condition precedent to voting, and he did not by his sojourn in Brooklyn as a marine acquire a residence there, notwithstanding the reasonable expectation at the time of enlistment, based on custom, that he would spend the first two years after his enlistment in Brooklyn. *In re Green*,* 5 Fed. R., 145.

§ 87. Under the constitution of Texas, providing that a person otherwise qualified, who shall have resided in the state "one year next preceding an election, and the last six months within the district or county in which he offers to vote, shall be deemed a qualified elector," a person who has resided within a district for six months, but who has not resided a full six months in the county in which he is a voter, may vote for state and district, but not for county officers. *United States v. Slater*,* 6 Fed. R., 824.

§ 88. — *citizenship.*—A person born in Oregon during the joint occupation of that territory by the United States and Great Britain, whose father was a citizen of Great Britain, and

whose mother was an Indian woman, is not entitled to vote if not naturalized, because not a citizen of the United States. *McKay v. Campbell*, 2 Saw., 118 (CITIZENS, §§ 10-17).

§ 89. — “Inhabitants.”—The provision in a law relating to the subscriptions by a town to the stock of a railway company provided that such subscriptions should be made upon a vote of “the inhabitants of the town.” *Held*, that the word “inhabitants” meant “voters.” *Walnut v. Wade*, 13 Otto, 683.

§ 90. — absence equivalent to vote with majority.—All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority voting, unless the law providing for the election otherwise declares. *County of Cass v. Johnston*, 5 Otto, 360 (BONDS, §§ 901-904); *St. Joseph Township v. Rogers*, 16 Wall., 644 (BONDS, §§ 1674-77).

§ 91. In Washington, under local law.—Under the election law in force in Washington in 1822, a ward election held by only two of three commissioners was void, and rendered the whole election void. *United States v. Carbery*,* 2 Cr. C. C., 358.

§ 92. Under the same law, it was held that it was competent to give parol evidence to show that the whole number of commissioners was present at the election in a given ward; that the election in each ward must be holden by three commissioners; that, if the three commissioners were present, the acts of the majority were in law the acts of the three, and that the return of two was sufficient if the three were present. *Ibid*.

§ 93. Upon a contest for the mayoralty of Washington, under an election held in 1822, it was held that the return of the commissioners of election for the various wards was not conclusive, but was *prima facie* evidence that the votes received were good, and threw the burden of proof to show that bad votes were given for the incumbent upon the contestant. *Ibid*.

§ 94. An election for mayor was declared void because in one ward only two commissioners held the election when three were required, and because no certificate of “the result of the election of mayor” was ever returned by the commissioners to the board of aldermen and board of common council, as required by the charter. *Ibid*.

EMANCIPATION.

See SLAVERY.

EMBARGO AND NON-INTERCOURSE LAWS.

[See PENALTIES AND FORFEITURES; WAR.]

§ 1. Act took effect, when.—The embargo act of 1807 took effect in a given district only after its reception by the collector. *The Ship Cotton Planter*,* 1 Paine, 23.

§ 2. In construing the non-intercourse act of 1820, British shipping laws were not considered. *United States v. An Open Boat*,* 5 Mason, 232.

§ 3. Power of congress to revive act.—The nineteenth section of the non-intercourse act of March 1, 1809, which provided that the act should be in force till a certain time and no longer, did not limit the right of congress to revive it either expressly or conditionally. *Cargo of the Brig Aurora v. United States*, 7 Cr., 332.

§ 4. The word “import,” used in the fifth section of the act of March 1, 1809, meant to bring into some port, harbor or haven, with an intent to land the goods there. *Schooner Mary and Cargo*,* 1 Gall., 206.

§ 5. The voluntary arrival of a vessel and cargo at her destined harbor in the United States is an importation within the meaning of the act of March 1, 1809, even though there is no breaking of bulk, and the vessel desires to proceed to another port. *Schooner Boston and Cargo*,* 1 Gall., 239.

§ 6. Notice.—Under the embargo act of 1809, it was not necessary that the notice to a shipowner to unload cargo or give a bond should be in writing. *Schooner Bolina and Cargo*,* 1 Gall., 75.

§ 7. Transshipment.—The third section of the act of January 9, 1808, supplementary to the embargo act, prohibiting the transshipment of goods from one vessel to another, did not apply to the loading of a vessel in a harbor by means of river craft, etc. *Schooner Paulina's Cargo v. United States*,* 7 Cr., 52.

§ 8. Double penalty.—Under the first embargo act, and the supplementary act, a vessel departing on a foreign voyage was liable on its departure, but the liability to the penalty of

double the value of the vessel and cargo attached only when the vessel had arrived at a foreign port and was beyond capture. *Parker v. United States*, 2 Wash., 361.

§ 9. Public enemies.—The non-intercourse act of March 1, 1809, does not apply to the case of public enemies or their acknowledged property. *The Schooner Rapid*, 1 Gall., 295.

§ 10. Right of owner to cargo.—Under the eleventh section of the embargo act of April, 1808, a collector seizing a vessel on suspicion has no right to or control over the cargo, which may be removed and disposed of by the owner. *Slocum v. Mayberry*, 2 Wheat., 1.

§ 11. Permit from collector to take on stores.—The collector of a port being authorized by the act of January 9, 1808, to grant permits to such vessels as were allowed to depart under the act to take on board necessary provisions and stores, the court refused to inquire whether such discretion, exercised without fraud by a collector in granting permits to put certain articles on board, was properly exercised, even in case where arms were taken on board, ostensibly for purposes of defense, under such a permit. *The Brig Isabella*, *1 Paine, 1.

§ 12. Refusal of clearance.—The second section of the additional embargo act, which provided that no ship should "receive a clearance unless the lading shall be made hereafter under the inspection of the proper revenue officers, subject to the same restrictions, regulations, penalties and forfeitures as are provided by law for the inspection of goods, wares and merchandise imported into the United States, upon which duties are imposed," simply denied a clearance to vessels lading contrary to its provisions, but imposed no forfeiture. *Schooner Paulina's Cargo v. United States*, *7 Cr., 52.

§ 13. Departure without a clearance.—Leaving a wharf with intent to depart on a voyage without a clearance is not within the third section of the embargo act of January 9, 1808, unless the vessel departs from the port. Sailing within the port, though with intent to depart, does not constitute the offense. *Sloop Active v. United States*, *7 Cr., 100; *S. C.*, *1 Paine, 247.

§ 14. Offense complete, when.—Under the third section of the embargo act of January 9, 1808, the offense was not complete till the arrival of the vessel in a foreign port. *United States v. Brig Eliza*, *7 Cr., 118.

§ 15. Voyage commenced, when.—Under the acts of July 13, 1861, and May 13, 1862, a vessel had not proceeded on her voyage and was not liable to seizure until she had left the harbor of her port of departure, although she had commenced to depart. *United States v. Schooner George Darby*, 26 Law Rep., 566.

§ 16. Prosecutions after expiration of law.—An offense punishable by fine and imprisonment under the act of January 9, 1808, was not within the saving clause of the second section of the act of June 23, 1809, and could not therefore be prosecuted after the expiration of the embargo act, under the act of March 1, 1809. *United States v. Mann*, 1 Gall., 177.

§ 17. Limitation of actions.—The limitation in the act of April 30, 1790, of two years upon actions to recover penalties, applies to actions brought to recover penalties incurred under the embargo act of January 9, 1808. *United States v. Mayo*, *1 Gall., 396.

§ 18. Action—Pleading.—In an action of debt under the third section of the embargo act of 1808, to recover double the value of the offending vessel, it was not necessary to allege the particular articles composing the cargo. *Cross v. United States*, *1 Gall., 26.

§ 19. Verdict need not find value of goods.—Upon a trial of an indictment under the third section of the embargo act of January 9, 1808, for loading goods on carriages with intent to convey them out of the United States, it was not necessary that the verdict should find the value of the goods intended to be conveyed, notwithstanding the act provided that the fine for such act should be four times the value of the goods so sought to be conveyed. *United States v. Tyler*, *7 Cr., 285.

§ 20. Circumstantial evidence of the identity of a vessel proceeded against for a violation of the non-intercourse acts, held sufficient to justify the condemnation. *Schooner Jane v. United States*, *7 Cr., 363.

§ 21. Prize.—Under the non-intercourse act of March 1, 1809, the United States cannot claim property captured on the high seas as a prize of war while bound from a British port to the United States, on the ground of the forfeiture antecedent to the capture. *The Schooner Rapid*, 1 Gall., 295.

§ 22. The capture of a vessel proceeded against for having violated the embargo act, held, upon consideration of the evidence, to have been *bona fide* and not collusive. *The Brig Short Staple and Cargo v. United States*, *9 Cr., 55.

§ 23. "British subject."—A subject of Great Britain, domiciled within the United States, and owning shipping protected by the laws of the United States, is not a "British subject" within the meaning of that term as used in the non-intercourse act of March 15, 1820. *United States v. An Open Boat and Lading*, *5 Mason, 120.

§ 24. French dependency.—By the non-intercourse act of February, 1806, San Domingo was recognized as a French dependency and was within its terms. *Clark v. United States*, *3 Wash., 101.

§ 25. On the rescission of a contract of affreightment, which could not then be carried out on account of the passage of the embargo act, the ship-owners were not entitled to claim freight, or anything in the nature of freight or damages. *Kelly v. Johnson*,* 3 Wash., 45.

§ 26. Foreign port.—A place within the territorial limits of the United States, but captured and occupied by a British force, is a "foreign port" within the meaning of the non-intercourse act of March 1, 1809. *United States v. Hayward*,* 2 Gall., 485.

§ 27. The high seas is not a "foreign place or port" within the meaning of the act of March 1, 1809. *The Ship Adventure and Cargo*,* 1 Marsh., 285.

§ 28. Persons under protection of United States.—A person born in the United States, but who removed to a Danish island, where he acquired property and married and took an oath of allegiance to the Danish government, is not a person under the protection of the United States within the meaning of the act of February 27, 1800. *Murray v. Schooner Charming Betsey*, 3 Cr., 64; *Sands v. Knox*, 3 Cr., 499.

§ 29. Insurance.—Where a vessel insured for a voyage was subsequently prevented from departing by the embargo law, it was held that the insured might abandon and recover as for a total loss. *Odlin v. Insurance Co. of Pennsylvania*, 2 Wash., 812.

§ 30. An embargo act did not render a contract of insurance for a foreign voyage void, but merely imposed a temporary restraint upon the performance of the voyage. *Ibid.*

§ 31. A vessel was forced by stress of weather to put into a French port in the West Indies, and a part of the cargo was unloaded to make repairs. The French authorities prohibited the loading of the cargo or its sale except for the products of the island. The cargo was disposed of for such productions. Held, that this was not such a trading as, under the non-intercourse act of 1793, would render a policy of insurance on the new cargo void. *Hallet v. Jenks*,* 3 Cr., 210.

§ 32. Seizure.—Custom-house officers were directly authorized to seize vessels offending against the provisions of the embargo act of 1809. *Schooner Bolina and Cargo*,* 1 Gall., 75.

§ 33. It was not necessary that a seizure by a collector under the embargo act should be made by the collector in person or by his written authority. *Ibid.*

§ 34. A doubt by a collector as to the proper construction of the act of April 25, 1808, was a proper ground of seizure. *The Schooner Friendship and Cargo*,* 1 Gall., 111.

§ 35. Vessel arrives, when.—Under the act of March 1, 1809, a vessel "arrived" in the United States when it voluntarily came within the jurisdictional limits thereof. *Thomson v. United States*,* 1 Marsh., 407.

§ 36. Remission of penalties.—Power of the secretary of the treasury to remit penalties can only be exercised in cases provided for by law. *The Margaretta and Cargo*,* 2 Gall., 515.

§ 37. The act of congress of January 2, 1813, authorizing the secretary of the treasury to remit the forfeiture incurred by the importation of goods from Great Britain between June 23 and December 23, 1812, where the goods were *bona fide* owned by a citizen or citizens of the United States, extended to cases in which the goods imported were owned by citizens of the United States and Great Britain jointly, and to the share owned by such citizens of the United States. *Gallego v. The United States*,* 1 Marsh., 439.

§ 38. What liable to forfeiture.—Sea stores and provisions are not liable to forfeiture under the embargo act of January 9, 1808. *United States v. Schooner Polly*,* 1 Hall's L. J., 488.

§ 39. Goods of British growth and manufacture, loaded at London with intent to import them into the United States, are liable to forfeiture under the act of March 1, 1809, and this even though so laded for the sole use of the owner and importer. *United States v. Ship Good Friends*,* 4 Hall's L. J., 488.

§ 40. Living fat oxen are "articles of provision" and "munitions of war" within the meaning of the act of July, 1806, but a driving of them on foot is not a "transportation" thereof within the meaning of the law. *United States v. Sheldon*,* 2 Wheat., 119.

§ 41. The fifth section of the non-intercourse act of March 1, 1809, imposed the penalty of forfeiture for the importation of goods forbidden on account of the place where laden, and also those prohibited on account of their being the growth of a prohibited nation. *United States v. The Nancy*,* 3 Wash., 281.

§ 42. The cargo forfeited for a violation of the non-intercourse act of March 15, 1820, was the cargo on board when the offense was committed and not that on board when the seizure was made. *United States v. An Open Boat*,* 5 Mason, 283.

§ 43. Goods placed on board a vessel with intent to import them into the United States in violation of the act of March 1, 1809, are forfeited. *Schooner Boston and Cargo*,* 1 Gall., 239.

§ 44. Under the fifth section of the act of March 1, 1809, the importation of goods of the manufacture of the British West Indies is prohibited, even though they have previously been imported into a neutral country and incorporated into the general stock of such neutral country. *Brig Rose*,* 1 Gall., 211.

§ 45. The fifth section of the act of March 1, 1809, applies to all goods the manufacture or growth of Great Britain or her dependencies, though imported into a neutral country prior to the passage of the act. *Ten Hogsheads of Rum*,* 1 Gall., 188.

§ 46. The return cargo of a vessel trading at a foreign port is not liable to forfeiture under the third section of the embargo act of January 9, 1808. *The Brig Short Staple*,* 1 Gall., 104.

§ 47. Under the navigation act of March 1, 1817 (3 Stat. at L. 351), which prohibited, after September 30, 1817, the importation of goods into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belonged to the citizens or subjects of that country of which the goods were the growth, production or manufacture, it was held that the importation into the United States of the products of the British colonies, in the East Indies in a ship belonging to English subjects and laden in London, was not forbidden. *United States v. The Ship Recorder*,* 1 Blatch., 218.

§ 48. The return cargo of a vessel which has proceeded to a foreign port is not liable to forfeiture under the supplementary embargo act of January 9, 1808. *United States v. Brig James Wells*,* 3 Day (Conn.), 296.

§ 49. Under the non-intercourse act of March 1, 1809, the importation of goods of British growth is forbidden, though they may not be liable to duty. *United States v. Schooner Mars*, 1 Gall., 237.

§ 50. Fat cattle are provisions or munitions of war within the act of July 6, 1812, prohibiting citizens of the United States from trading with its enemies. *United States v. Barber*, 9 Cr., 248.

§ 51. Articles prohibited under the non-intercourse act of March 1, 1809, are liable to forfeiture if imported into the United States, even though, before the passage of the act, they had been imported into the United States and thence exported to the place from whence finally imported. *The Schooner Hoppet and Cargo v. United States*, 7 Cr., 389.

§ 52. What vessels liable.—Under the act of February 27, 1800, only those vessels were liable to forfeiture which were within the description of the act when the forfeiture took place, and not those within the description of the act when it was passed. *Murray v. Schooner Charming Betsey*, 2 Cr., 64; *Sands v. Knox*, 3 Cr., 499.

§ 53. A vessel bound from a French port was not liable to seizure under the fifth section of the act of February 9, 1799. *Little v. Barreme*, 2 Cr., 170.

§ 54. A vessel sailing to an interdicted port without permission of the president, upon public service, is liable to forfeiture under the third section of the act of June 28, 1809, or if proceeding to a permitted port without having given a bond. *Brig Wasp*,* 1 Gall., 140.

§ 55. A registered vessel was within the prohibition of the third section of the embargo act of January 9, 1808. *The Brig Short Staple*,* 1 Gall., 104.

§ 56. The words "foreign vessel," used in the fifth section of the embargo act of January 9, 1808, meant a vessel sailing under a foreign flag, and not one owned by resident aliens. *Schooner Sally and Cargo*,* 1 Gall., 58.

§ 57. The non-intercourse act of June 28, 1809, applies to a vessel departing to a prohibited port in ballast. *Ship Richmond v. United States*,* 9 Cr., 102.

§ 58. An American vessel, which was captured and had been condemned as a prize and purchased by an American citizen who was her former owner, was loaded and cleared as a *Dane*. *Held*, that such vessel was liable to condemnation under the fifth section of the embargo act of January 9, 1808, as a foreign vessel. *Schooner Good Catherine v. United States*,* 7 Cr., 349.

§ 59. The non-intercourse act of March 1, 1809, was revived as well against British ships as British goods by the act of March 2, 1811. *Thomson v. United States*,* 1 Marsh., 407.

§ 60. A derelict vessel brought in by salvors is not within the prohibition of the non-intercourse acts of April 18, 1818, and May 15, 1820. The entry must be voluntary to subject to forfeiture. *The Waterloo*, Bl. & How., 114.

§ 61. A vessel and cargo are not liable to forfeiture under the second section of the third supplement to the embargo act for lading in the night-time. The only penalty for such loading would seem to be the denial of a clearance. *Schooner Enterprise v. United States*,* 4 Am. L. J. (N. S.), 115.

§ 62. A British ship and cargo captured by a French cruiser and presented to American seamen on the high seas, and by them brought into the United States, is not liable to forfeiture under the act of March 1, 1809. *The Ship Adventure and Cargo*,* 1 Marsh., 235; 8 Cr., 221.

§ 63. It seems that an open boat is not a "ship or vessel" within the meaning of the non-intercourse act of March 15, 1820. *United States v. An Open Boat and Lading*,* 5 Mason, 120.

§ 64. An open boat of less than thirty tons' burden, owned by British subjects resident in a British province, is not within the prohibitions of the non-intercourse act of March 15, 1820. *United States v. An Open Boat*,* 5 Mason, 232.

§ 65. In case of a voluntary importation into the United States of property prohibited by

the non-intercourse laws, both the vessel and cargo were liable to forfeiture, no matter of what nationality the vessel was. *The Æolus*,* 3 Wheat., 892.

§ 66. A sale of forfeited property, before seizure, to one who has actual notice, or is chargeable with notice of the facts, does not exonerate the property from forfeiture. *The Brig Plough-boy*, 1 Gall., 41.

§ 67. Under the non-intercourse act of 1809 the forfeiture of property takes place upon the commission of the offense, and such forfeiture is not purged by a subsequent *bona fide* sale. *United States v. 1960 Bags of Coffee*,* 8 Cr., 898; *United States v. Brigantine Mars*,* 8 Cr., 417. Forfeited property sold before seizure without notice is exonerated from all claims of the United States on account of such forfeiture. *The Brig Mars*, 1 Gall., 192.

§ 68. What a violation of the law.—A departure of a vessel from the waters within three miles of the coast of the United States, upon a foreign voyage, is a violation of the embargo act of 1808, though such departure may not be from a harbor. *Brig Ann*,* 1 Gall., 61.

§ 69. Under the non-intercourse act, a vessel from Great Britain had a right to lay off the coast of the United States and await orders from owners in this country, and, if compelled to do so, to anchor or to make a harbor, and, if prevented from departing by a mutiny of the crew, might wait for orders within the waters of the United States. *United States v. Cargo of the Ship Fanny*,* 9 Cr., 181.

§ 70. That the person in charge of the cargo of a ship, who, by the breaking out of the war of 1812 became an alien enemy, brought the ship and a prohibited cargo belonging to citizens of the United States into the United States during the existence of the war, does not relieve the vessel and cargo from forfeiture by the non-intercourse act. *Thomson v. United States*,* 1 Marsh., 407.

§ 71. A vessel was liable for violations of the embargo act by acts of the master, though the violation was without the knowledge, and against the will, of the owners. *United States v. Schooner Little Charles*,* 1 Marsh., 847.

§ 72. It was no violation of the act of April 18, 1818, for a British ship from a Spanish port bound for New Orleans, to stop at a closed British port for provisions. *The Francis & Eliza*,* 8 Wheat., 898.

§ 73. Where a vessel from a closed British port unloaded her cargo at a Spanish port and there, in good faith, took a new cargo which she brought to the United States, there was no violation of the act of April, 1818. *The Pitt*,* 8 Wheat., 871.

§ 74. The embargo act of December 22, 1807, prohibited the departure of registered vessels on a foreign voyage, and they were liable to forfeiture under the supplementary act of January 9, 1808. *The William King*,* 2 Wheat., 148.

§ 75. During the existence of the embargo acts, a vessel carried to a foreign port by means of a collusive capture was liable to forfeiture. *Ibid.*

§ 76. Under section 3 of the non-intercourse act of March 1, 1809, a vessel sailing from the United States for a foreign port was liable to forfeiture for omission to give a bond not to proceed to an interdicted port. *The Edward*,* 1 Wheat., 261.

§ 77. The "commercial intercourse" prohibited by the non-intercourse act of March 1, 1809, consisted of importations from Great Britain and France, and of the products and manufactures of those countries, and of exportations to them. *Ibid.*

§ 78. The liability to forfeiture of goods shipped from a prohibited port, with intent to import them into the United States, was not removed by landing and paying duty on them at a Spanish port, and then transhipping them to the United States. *United States v. The Nancy*,* 8 Wash., 281.

§ 79. On an information for a breach of the non-intercourse laws, suspicious circumstances were held to outweigh positive testimony. *Nelson v. United States*,* Pet. C. C., 285.

§ 80. An intention to violate the non-intercourse acts was presumed from the bringing into the United States of prohibited goods from a prohibited port. *United States v. The Paul Shearman*,* Pet. C. C., 98.

§ 81. Under the sixth section of the non-intercourse act of March 1, 1809, the importation of prohibited goods into the United States would not work a forfeiture of the ship unless such goods were put on board with an intention so to import them, and with the knowledge of the master or owner. *The Ship Ann Maria*,* 1 Paine, 256.

§ 82. The second section of the act of April 25, 1808, was so loosely drawn that it was held that lading goods in the night-time could not be punished under it. *The Schooner Enterprise*,* 1 Paine, 82.

§ 83. Under the embargo laws of 1808 a licensed vessel was not required to obtain a clearance on departing from port, but only when departing from a district of the United States. *Held*, therefore, that a vessel licensed in the district of New York and found in Long Island Sound without a clearance was forfeited. *The Elizabeth*,* 1 Paine, 10.

§ 84. *Necessity—Stress of weather.*—It is no breach of the bond given under the act of March 12, 1808, that a vessel was forced into an interdicted port by stress of weather, and there compelled by the authorities to dispose of her cargo. *Durousseau v. United States*, 6 Cr., 307.

§ 85. An embargo bond provided that the cargo of the vessel should be relanded at East Portland or some port of the United States, "the dangers of the sea only excepted." The vessel being driven by stress of weather to Porto Rico, the cargo was landed and there sold by order of the authorities of that island. *Held*, that the necessity under which the owners acted was within the exception of the bond. *United States v. Hall*,* 6 Cr., 171.

§ 86. The "danger of the sea," which would excuse what would otherwise be a breach of an embargo bond, must have happened without the fault or negligence of the master, and must have occurred at sea; or if it occurred on land it must have been the direct consequence of a peril at sea. *United States v. Hall*, 2 Wash., 866.

§ 87. What was a peril at sea which would excuse what would otherwise have been a breach of an embargo bond was a question of law. *Ibid*.

§ 88. The evidence of that necessity which will excuse a violation of the embargo law must be clear and positive. *Brig James Wells v. United States*,* 7 Cr., 22.

§ 89. A vessel was seized in the harbor of Savannah for violating the non-intercourse act. It was claimed that there was no intention to violate the law; that she intended to stand on and off till she could learn whether she might enter, but was driven in by stress of weather; and that she had no intention to violate the law. As it appeared that she had failed to make diligent inquiries, the court held that she came in at her peril; that she was bound to get information, and was negligent in failing to inquire. *Brig Penobscot v. United States*,* 7 Cr., 356.

§ 90. Circumstantial evidence held to outweigh positive testimony of *vis major* in proceedings to condemn a vessel for violating the embargo act. *Brig Struggle v. United States*,* 9 Cr., 71.

§ 91. *Necessity*, to excuse a forfeiture under the embargo act, must be clearly made out. *Held*, not made out. *Ship Argo and Appurtenances*,* 1 Gall., 150.

§ 92. Under the non-intercourse act of March 1, 1809, a vessel might come within the territorial limits of the United States to communicate with her owners, and if afterwards driven into a port of the United States by stress of weather, there was still no forfeiture. *Schooner Mary and Cargo*,* 1 Gall., 206.

§ 93. A ship was not "forced in by distress, or by the dangers of the sea," within the meaning of the act of March 1, 1809, which came voluntarily into harbor upon the representation of a pilot, made in fair weather, that a storm might be expected. *Thomson v. United States*,* 1 Marsh., 407.

§ 94. *Necessity* will excuse what would otherwise be a violation of the embargo act, as where a ship bound for a home port was forced by stress of weather to a foreign port and there was refused permission to depart without disposing of the cargo. *The William Gray*,* 1 Paine, 16.

§ 95. Want of seaworthiness at the time of sailing in a vessel which put into a foreign port under stress of weather, etc., was a circumstance which might be considered in determining whether there had been a breach of an embargo bond. *United States v. Dixey*,* 3 Wash., 15.

§ 96. If it appears, in an action on an embargo bond, that a vessel which claimed to have been driven to a foreign port by stress of weather was not seaworthy for the voyage upon which she was ostensibly bound, judgment must be given against the defendants. *United States v. Mitchel*,* 3 Wash., 95.

§ 97. If articles whose importation is prohibited under the non-intercourse act are taken on board a vessel with intention to import them into the United States with the owner's or master's knowledge, the vessel is liable to forfeiture if she enters a port of the United States, whether forced in by stress of weather or not, and the goods also, if the arrival is voluntary on the master's part. *The New York*,* 3 Wheat., 59.

§ 98. Threats of a crew to abandon a vessel held not to excuse coming into port with a prohibited cargo. *Ibid*.

§ 99. *Share of penalty.*—The United States are entitled to one-half of a forfeiture incurred under the act of February, 1806, forbidding trade with certain ports of the island of San Domingo. *United States v. Yeaton*, 2 Cr. C. C., 73.

§ 100. Under section 2 of the embargo act of December 22, 1807, giving the collector of the district in which the bond was taken a moiety of the amount recovered, the moiety belonged to the collector at the time the bond was given, and who prosecuted the bond, and not to the collector in office when the money was paid. *Shore v. Jones*,* 1 Marsh., 285.

§ 101. The personal representatives of deceased revenue officers, and not their successors in

office, were entitled to the shares coming to such officers as penalty for breach of an embargo bond. *Jones v. Shore*,* 1 Wheat., 463.

§ 102. Under the eighteenth section of the non-intercourse act of March 1, 1809, the officers of a revenue cutter giving information of a violation of the law were entitled to one-half the proceeds. It was sufficient, to entitle them to such share, that the information they gave led to condemnation, and such share need not be claimed when information is given. *Sawyer v. Steele*,* 3 Wash., 464.

§ 103. Forms of action.—An action of debt will lie by the United States to recover a penalty incurred by the master of a ship under section 8 of the embargo act of January 9, 1808. *United States v. Allen*,* 4 Day, 474.

§ 104. The importation of goods in violation of section 1 of the embargo act of January 9, 1808, was a misdemeanor, and a prosecution therefor by information in the circuit court was proper. *United States v. Mann*, 1 Gall., 3.

§ 105. Under the provisions of the embargo act of 1809, proceedings against vessels and cargoes might be *in rem*. *Schooner Bolina and Cargo*,* 1 Gall., 75.

§ 106. Repeal of law—Suspension—Revival.—The second and fifth sections of the embargo act of January 9, 1808, were repealed by the fourteenth section of the act of March 1, 1809. *Sloop Falmouth and Cargo*,* 1 Gall., 129.

§ 107. The third section of the embargo act of January 9, 1808, was not repealed by the act of March 1, 1809. *Ship Argo and Appurtenances*,* 1 Gall., 150.

§ 108. The third section of the non-intercourse act of March 1, 1809, was not abrogated by the declaration of war between United States and Great Britain in 1812. *Thomson v. United States*,* 1 Marsh., 407.

§ 109. The proclamation of the president of June 18, 1865, removing all restrictions from the coastwise trade, etc., in all the territory east of the Mississippi, took effect and rendered inoperative the act of July 2, 1864, from the beginning of that day. *United States v. Norton*, 7 Otto, 164.

§ 110. By the nineteenth section of the act of March 1, 1809, and the second section of the act of June 28, 1809, the embargo act was repealed as to all cases after the 28th of June, 1809. *Schooner Orono*,* 1 Gall., 137.

§ 111. The act of March 1, 1809, was suspended by the proclamation of the president, even though that proclamation was based on a mistake of fact, and having been thus suspended could not be revived by another proclamation. *Ibid.*; *Brig Wasp*,* 1 Gall., 140.

§ 112. The non-intercourse act of March 1, 1809, was revived by the proclamation of the president, and its operation as so revived commenced February 2, 1811. *Cargo of the Brig Aurora v. United States*, 7 Cr., 332.

§ 113. The act of March 2, 1811, reviving the non-intercourse act of March 1, 1809, did not revive such act as to places simply in the possession of Great Britain, and not her colonies or dependencies. *United States v. The Nancy*,* 3 Wash., 281.

§ 114. The non-intercourse act of March 1, 1809, continued to be partially in force until the expiration of the session of congress which succeeded that of May, 1809, and the provision requiring a bond not to proceed to an interdicted port applied to a ship sailing from the United States to a permitted port in February and March, 1810. *The Edward*,* 1 Wheat., 261.

§ 115. Detaining vessel on suspicion.—Under the eleventh section of the embargo act of April 25, 1808, a collector had no right to detain a vessel and cargo after the arrival of the vessel at her port of destination, on suspicion that she intended to violate the provisions of the embargo. *Otis v. Bacon*,* 7 Cr., 589.

§ 116. Under the embargo act of April 25, 1808, a collector was justified in detaining a ship and cargo arriving in his district when in his opinion an evasion or violation of the law was intended. *Crowell v. McFadon*,* 8 Cr., 94; *Otis v. Watkins*,* 9 Cr., 339.

§ 117. Under the eleventh section of the embargo act of 1808, a collector might detain a vessel which in his opinion was about to evade or violate the law, but could not properly remove it to another port unless such removal was necessary for the purpose of detention. (Per MARSHALL, C. J.) *Otis v. Watkins*,* 9 Cr., 339.

§ 118. A seizure of a ship by a collector after the termination of the voyage, under suspicion of intention to violate the embargo act, was unjustifiable. But where a vessel did not arrive at her port of destination, and her demand for a permit to land at another place excited an honest suspicion in the mind of the collector that such demand was colorable, there was held to be no such termination of the voyage as precluded the right of detention. *Otis v. Walter*,* 2 Wheat., 18.

§ 119. In case of a seizure by a collector under the embargo laws it was not necessary for the collector to show probable cause. The discretion confided to the collector was a sufficient justification. *Ibid.*

§ 120. That part of the embargo act permitting a collector to detain a vessel under suspicion

of intending to violate such law relates only to vessels ostensibly bound to some port of the United States. *Ibid.*

§ 121. Where a vessel was detained by a collector upon suspicion of an intention to violate the embargo, no further detention of the cargo was lawful than what was necessarily dependent upon the detention of the vessel. *Ibid.*

§ 122. The arrival of a vessel in a port and a demand for a permit to land the cargo was not such a termination of the voyage as would deprive the collector of the right to seize her on suspicion under the embargo act, if the port to which she arrived was not the one for which she had cleared. *Otis v. Walter*, * 6 Wheat., 583.

§ 123. A collector seizing a vessel on suspicion under the embargo act could unload the cargo if in his opinion it was necessary to do so for the security and preservation of the property, if such unloading and storing was at his own expense, without being liable for a conversion of the property. *Ibid.*

§ 124. Under the embargo act of 1806 a collector might detain a vessel upon suspicion at any time before the termination of her voyage, and had, so long as acting honestly, an unlimited discretion in the matter. *Otis v. Walter*, * 11 Wheat., 192.

§ 125. An embargo bond taken for thrice the value of the goods, instead of for twice the value, as required by statute, is void. *United States v. Gordon*, 1 Marsh., 190.

§ 126. Section 1 of the embargo act of January 9, 1808, which provided that vessels should give a bond before clearance, was merely directory as to time, and a bond given after the clearance had issued was valid. *Speake v. United States*, 9 Cr., 28.

§ 127. Where an embargo bond was given without fraud or circumvention the obligor was estopped to allege that the bond was taken for more than double the value of the goods. *Ibid.*

§ 128. An embargo bond taken under section 18 of the act of March 1, 1809, containing a condition that the certificate required by that section shall be produced to the collector within six months, is valid. *United States v. Sawyer*, 1 Gall., 86.

§ 129. An embargo bond under the act of December 23, 1807, should run to the United States instead of to the collector of the district. *Dixon v. United States*, * 1 Marsh., 177.

§ 130. An embargo bond, though a contract in restraint of trade, is nevertheless valid if made during the existence of the embargo laws, because made according to the then policy of the law. *Ibid.*

§ 131. The insertion in an embargo bond, given by a registered vessel, of a condition which the statute required in bonds given by licensed vessels, but which it did not require in bonds given by registered vessels, held to vitiate the bond. *Ibid.*

§ 132. An embargo bond held void because not pursuing the provisions of the embargo act. *United States v. Morgan*, * 3 Wash., 10.

§ 133. In a proceeding against a ship and cargo under the non-importation laws, where a bond was given for the appraised value of the ship and cargo, judgment was rendered, where the property was condemned for the appraised value, with interest from the date of the decree in the district court. *The Diana*, * 3 Wheat., 58.

§ 134. Under the third section of the act of May 20, 1862, the secretary of the treasury was authorized to require reasonable security that goods transported in vessels should not be landed at places under insurrectionary control, and a bond given by the shipper and two sureties in double the value of the goods shipped was held to be such reasonable security as the secretary was thereby authorized to require. *United States v. Mora*, 7 Otto, 418.

§ 135. By virtue of the second section of the act of May 20, 1862, a collector had a right to refuse a clearance to vessels under suspicion; and if, in order to obtain a clearance, a bond was voluntarily executed, it will be upheld. *Ibid.*

§ 136. A superadded condition to the bond which the secretary of the treasury was authorized to require under the act of May 20, 1862, which might be disregarded, held not to vitiate the bond. *Ibid.*

EMBEZZLEMENT

See CRIMES.

EMINENT DOMAIN.

I. IN GENERAL, §§ 1-70.

II. PROCEEDINGS IN CONDEMNATION, §§ 71-111.

I. IN GENERAL.

SUMMARY—*Federal government has the right of, §§ 1, 2.—What constitutes a taking, § 3.—Compensation must be made, § 4.—When title passes, §§ 5, 6.*

§ 1. The right of eminent domain is an attribute of sovereignty possessed by the federal government, and may be exercised within the limits of a state without its consent. *Kohl v. United States*, §§ 7-18. See §§ 22-24, 69, 70.

§ 2. An act of congress authorizing the secretary of the treasury "to purchase," followed by an amendatory act making an appropriation "for the purchase at private sale or by condemnation of the ground for a site" for government buildings, was held to confer upon him the discretion to acquire the needed grounds by exercise of the right of eminent domain or by private purchase. (*FIELD, J.*, dissented.) *Ibid.* See §§ 57-60.

§ 3. Causing the lands of private persons to be overflowed in the prosecution of any public work is a taking in the sense of the constitutional limitations upon the right of eminent domain. *Pumpelly v. Green Bay Co.*, §§ 14-19. See §§ 44-48.

§ 4. Lands patented by government without reservations are not liable to be appropriated to public use, either by federal or state authority, without compensation being made; and the absolute ownership and right of property in the same is not varied by the fact that it borders a navigable stream. *Ibid.* See §§ 44-48, 72.

§ 5. Under a constitutional provision that "no man's property shall be taken or applied to public use without the consent of his representatives, or without just compensation being made therefor," the right to enter on and use the property is complete as soon as the property is actually appropriated, under the authority of law, for a public use, but the title does not pass from the owner without his consent until just compensation has been made to him. *Kennedy v. Indianapolis*, §§ 20, 21. See § 43.

§ 6. Where land was appropriated for the purposes of a canal, and no compensation in money was made, but the owners were deemed to be compensated by benefits resulting from the construction of the work, which was never completed as contemplated, and the state sold the property, *held*, that the purchaser took nothing by the purchase. *Ibid.* See §§ 48-50, 67, 68.

[NOTE.—See §§ 22-70.]

KOHL v. UNITED STATES.

(1 Otto, 367-379. 1875.)

ERROR to U. S. Circuit Court, Southern District of Ohio.

STATEMENT OF FACTS.—Proceeding by the United States to condemn land for a postoffice. A motion to dismiss for want of jurisdiction was overruled, and the plaintiffs in error moved for a separate trial as to the value of their interest in the land.

§ 7. *The right of eminent domain is possessed by the federal and state governments.*

Opinion by MR. JUSTICE STRONG.

It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the states for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the constitution in the general government demand for their exercise the

acquisition of lands in all the states. These are needed for forts, armories and arsenals, for navy yards and light-houses, for custom-houses, postoffices and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a state prohibiting a sale to the federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a state, or even upon that of a private citizen. This cannot be. No one doubts the existence in the state governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vattel, c. 20, § 34; Bynk., lib. 2, c. 15; Kent's Com., 338-340; Cooley on Const. Lim., 584 *et seq.* But it is no more necessary for the exercise of the powers of a state government than it is for the exercise of the conceded powers of the federal government. That government is as sovereign within its sphere as the states are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the states over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

§ 8. — *authorities reviewed.*

But, if the right of eminent domain exists in the federal government, it is a right which may be exercised within the states, so far as is necessary to the enjoyment of the powers conferred upon it by the constitution. In *Ableman v. Booth*, 21 How., 528, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish postoffices and to create courts within the states was conferred upon the federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?

In *Cooley on Constitutional Limitations*, 526, it is said: "So far as the general government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions,—as

must sometimes be necessary in the case of forts, light-houses and military posts or roads, and other conveniences and necessities of government,—the general government may exercise the authority as well within the states as within the territory under its exclusive jurisdiction; and its right to do so may be supported by the same reasons which support the right in any case; that is to say, the absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties or of any other authority.”

We refer, also, to *Trombley v. Humphrey*, 23 Mich., 471; 10 Pet., 723; *Dickey v. Turnpike Co.*, 7 Dana, 113; *McCullough v. Maryland*, 4 Wheat., 429 (Constr., §§ 380–98).

It is true this power of the federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. In some instances the states, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the states. Such was the ruling in *Gilmer v. Lime Point*, 18 Cal., 229, where lands were condemned by a proceeding in a state court and under a state law for a United States fortification. A similar decision was made in *Burt v. The Merchants' Ins. Co.*, 106 Mass., 356, where land was taken under a state law as a site for a postoffice and sub-treasury building. Neither of these cases denies the right of the federal government to have lands in the states condemned for its uses under its own power and by its own action. The question was whether the state could take lands for any other public use than that of the state. In *Trombley v. Humphrey*, 23 Mich., 471, a different doctrine was asserted, founded, we think, upon better reason. The proper view of the right of eminent domain seems to be that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a state. Nor can any state prescribe the manner in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction, and of the right of exclusive legislation, after the land shall have been acquired.

§ 9. *Act of congress giving the secretary of the treasury power to acquire site for government building.*

It may, therefore, fairly be concluded that the proceeding in the case we have in hand was a proceeding by the United States government in its own right, and by virtue of its own eminent domain. The act of congress of March 2, 1872 (17 Stat., 39), gave authority to the secretary of the treasury to purchase a central and suitable site in the city of Cincinnati, Ohio, for the erection of a building for the accommodation of the United States courts, custom-house, United States depository, postoffice, internal revenue and pension offices, at a cost not exceeding \$300,000, and a proviso to the act declared that no money should be expended in the purchase until the state of Ohio should cede its jurisdiction over the site and relinquish to the United States the right to tax the property. The authority here given was to purchase. If that were all, it might be doubted whether the right of eminent domain was in-

tended to be invoked. It is true the words "to purchase" might be construed as including the power to acquire by condemnation; for technically purchase includes all modes of acquisition other than that of descent. But generally, in statutes as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties, without governmental interference. That congress intended more than this is evident, however, in view of the subsequent and amendatory act passed June 10, 1872, which made an appropriation "for the purchase, at private sale or by condemnation, of the ground for a site" for the building. These provisions, connected as they are, manifest a clear intention to confer upon the secretary of the treasury power to acquire the grounds needed by the exercise of the national right of eminent domain, or by private purchase, at his discretion. Why speak of condemnation at all, if congress had not in view an exercise of the right of eminent domain, and did not intend to confer upon the secretary the right to invoke it?

§ 10. *Proceedings in condemnation are in the nature of a suit.*

But it is contended on behalf of the plaintiffs in error that the circuit court had no jurisdiction of the proceeding. There is nothing in the acts of 1872, it is true, that directs the process by which the contemplated condemnation should be effected, or which expressly authorizes a proceeding in the circuit court to secure it. Doubtless congress might have provided a mode of taking the land, and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the circuit court; but this, we think, was not necessary. The investment of the secretary of the treasury with power to obtain the land by condemnation, without prescribing the mode of exercising the power, gave him also the power to obtain it by any means that were competent to adjudge a condemnation. The judiciary act of 1789 conferred upon the circuit courts of the United States jurisdiction of all suits at common law or in equity, when the United States, or any officer thereof, suing under the authority of any act of congress, are plaintiffs. If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the circuit court. That it is a "suit" admits of no question. In *Weston v. Charleston*, 2 Pet., 464 (Constr., §§ 399-407), Chief Justice Marshall, speaking for this court, said: "The term [suit] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceeding may be various; but, if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit." A writ of prohibition has, therefore, been held to be a suit; so has a writ of right, of which the circuit court has jurisdiction (*Green v. Lister*, 8 Cranch., 229); so has *habeas corpus*. *Holmes v. Jennison*, 14 Pet., 564 (APPEALS, §§ 1009-34). When, in the eleventh section of the judiciary act of 1789, jurisdiction of suits of a civil nature at common law or in equity was given to the circuit courts, it was intended to embrace not merely suits which the common law recognized as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined as distinguished from rights in equity, as well as suits in admiralty. The right of eminent domain always was a right at common law. It was not

a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial, for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right. It is quite immaterial that congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least *quasi* judicial. Certainly no other mode than a judicial trial has been provided.

It is argued that the assessment of property for the purpose of taking it is in its nature like the assessment of its value for the purpose of taxation. It is said they are both valuations of the property to be made as the legislature may prescribe, to enable the government, in the one case, to take the whole of it, and in the other to take a part of it for public uses; and it is argued that no one but congress could prescribe in either case that the valuation should be made in a judicial tribunal or in a judicial proceeding, although it is admitted that the legislature might authorize the valuation to be thus made in either case. If the supposed analogy be admitted it proves nothing. Assessments for taxation are specially provided for, and a mode is prescribed. No other is, therefore, admissible. But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law; and hence, as the government is a suitor for the property under a claim of legal right to take it, there appears to be no reason for holding that the proper circuit court has not jurisdiction of the suit, under the general grant of jurisdiction made by the act of 1789.

§ 11. *Separate trials in condemnation proceedings.*

The second assignment of error is, that the circuit court refused the demand of the defendants below, now plaintiffs in error, for a separate trial of the value of their estate in the property. They were lessees of one of the parcels sought to be taken, and they demanded a separate trial of the value of their interest; but the court overruled their demand, and required that the jury should appraise the value of the lot or parcel, and that the lessees should in the same trial try the value of their leasehold estate therein. In directing the course of the trial, the court required the lessor and the lessees each separately to state the nature of their estates to the jury, the lessor to offer his testimony separately, and the lessees theirs, and then the government to answer the testimony of the lessor and the lessees; and the court instructed the jury to find and return separately the value of the estates of the lessor and the lessees. It is of this that the lessees complain. They contend that whether the proceeding is to be treated as founded on the national right of eminent domain, or on that of the state, its consent having been given by the enactment of the state legislature of February 15, 1873 (70 Ohio Laws, 36, sec. 1), it was required to conform to the practice and proceedings in the courts of the state in like cases. This requirement, it is said, was made by the act of congress of June 1, 1872. 17 Stat., 522. But, admitting that the court was bound to conform to the practice and proceedings in the state courts in like cases, we do not perceive that any error was committed. Under the laws of Ohio, it was regular to institute a joint proceeding against all the owners of lots proposed

to be taken (*Giesy v. C. W. & T. R. Co.*, 4 Ohio St., 308); but the eighth section of the state statute gave to "the owner or owners of each separate parcel" the right to a separate trial. In such a case, therefore, a separate trial is the mode of proceeding in the state courts. The statute treats all the owners of a parcel as one party, and gives to them collectively a trial separate from the trial of the issues between the government and the owners of other parcels. It hath this extent; no more. The court is not required to allow a separate trial to each owner of an estate or interest in each parcel, and no consideration of justice to those owners would be subserved by it. The circuit court, therefore, gave to the plaintiffs in error all, if not more than all, they had a right to ask.

The judgment of the circuit court is affirmed.

§ 12. *Proceedings to condemn property is not a suit at law or in equity.*

Dissenting opinion by MR. JUSTICE FIELD.

Assuming that the majority are correct in the doctrine announced in the opinion of the court,—that the right of eminent domain within the states, using those terms not as synonymous with the ultimate dominion or title to property, but as indicating merely the right to take private property for public uses, belongs to the federal government, to enable it to execute the powers conferred by the constitution,—and that any other doctrine would subordinate, in important particulars, the national authority to the caprice of individuals or the will of state legislatures, it appears to me that provision for the exercise of the right must first be made by legislation. The federal courts have no inherent jurisdiction of a proceeding instituted for the condemnation of property; and I do not find any statute of congress conferring upon them such authority. The judiciary act of 1789 only invests the circuit courts of the United States with jurisdiction, concurrent with that of the state courts, of suits of a civil nature at common law or in equity; and these terms have reference to those classes of cases which are conducted by regular pleadings between parties according to the established doctrines prevailing at the time in the jurisprudence of England. The proceeding to ascertain the value of property which the government may deem necessary to the execution of its powers, and thus the compensation to be made for its appropriation, is not a suit at common law or in equity, but an inquisition for the ascertainment of a particular fact as preliminary to the taking; and all that is required is that the proceeding shall be conducted in some fair and just mode, to be provided by law, either with or without the intervention of a jury, opportunity being afforded to parties interested to present evidence as to the value of the property, and to be heard thereon. The proceeding by the states, in the exercise of their right of eminent domain, is often had before commissioners of assessment or special boards appointed for that purpose. It can hardly be doubted that congress might provide for inquisition as to the value of property to be taken by similar instrumentalities; and yet, if the proceeding be a suit at common law, the intervention of a jury would be required by the seventh amendment to the constitution.

I think that the decision of the majority of the court in including the proceeding in this case under the general designation of a suit at common law, with which the circuit courts of the United States are invested by the eleventh section of the judiciary act, goes beyond previous adjudications, and is in conflict with them.

§ 13. *Authority to purchase does not include condemnation.*

Nor am I able to agree with the majority in their opinion, or at least intimation, that the authority to purchase carries with it authority to acquire by condemnation. The one supposes an agreement upon valuation and a voluntary conveyance of the property; the other implies a compulsory taking and a contestation as to the value. *Beekman v. Saratoga & Schenectady R. Co.*, 3 Paige, 75; *Railroad Co. v. Davis*, 2 Dev. & Batt., 465; *Willyard v. Hamilton*, 7 Ham. (Ohio), 453; *Livingston v. The Mayor of New York*, 7 Wend., 85; *Koppikus v. State Capital Commissioners*, 16 Cal., 249.

For these reasons I am compelled to dissent from the opinion of the court.

PUMPELLY v. GREEN BAY COMPANY.

(18 Wallace, 166-182. 1871.)

ERROR to U. S. Circuit Court, District of Wisconsin.

STATEMENT OF FACTS.—Pumpelly sued the Green Bay Company for building a dam across Fox river, the outlet of Lake Winnebago, by which a large body of his land was overflowed. The defendant relied upon authority granted by the legislature of Wisconsin to construct works of public improvement, etc. There was judgment for the defendant.

Opinion by MR. JUSTICE MILLER.

The second plea, the most important, is technically liable to the objection that it relies on two substantially different grounds of defense; but as the demurrer was general and not special, and as the part of it which sets up the first of these defenses may be treated as mere inducement to the other, we will consider whether there is found in the plea any sufficient defense to the cause of action set out in the declaration.

This first part of the plea is clearly designed to present this defense, that the dam was authorized by statute and built in conformity to the specific requirements of the act, so that the defendants are not liable for exceeding the authority which it conferred, and that for any injury to the plaintiff's property arising from this lawful erection of the dam his only remedy was the one provided in the act referred to concerning mills and mill-dams. As this enacted that persons whose lands were overflowed might obtain compensation upon complaint before the district court of the county where the land lay, and that no action at common law should be sustained for such damages, except as provided in the act, if the remainder of the plea is good, it is a defense to the present suit. But this part of the plea is defective in this. It is contended by the counsel for the defendants that the second section of the act authorizes them to build their dam seven feet above high-water mark of the river at all events, and that the restriction that the water of the lake shall not be raised above its ordinary level is only applicable to such raising, if the dam should exceed the first limitation; while the counsel for the plaintiff asserts that both limitations were effectual, and that if the dam raised the water in the lake above its ordinary level the law was violated, though it may not have reached the seven feet above high-water of the river.

§ 14. *It is bad pleading to state a conclusion of law in a plea.*

It will be seen that the plea, in averring that the dam, when completed, was no higher than the statute authorized, pleads a conclusion of law, and does not state the facts on which the court can construe the law for itself and ascertain if the fact pleaded is a good defense. This is bad pleading. It is also liable

to the objection that it does not either deny the allegation of the declaration, that the dam raised the water in Winnebago lake so as to overflow the plaintiff's land, nor admit that allegation and aver that they were authorized to do so by the statute. But, as we are of opinion that the statute did not authorize the erection of a dam which would raise the water of the lake above the ordinary level, and as the plea does not deny that the dam of the defendant did so raise the water of the lake, we must hold that, so far as the plea relies on this statute as a defense, it is fatally defective.

But this same plea further alleges that the legislature of Wisconsin, after it became a state, projected a system of improving the navigation of the Fox and Wisconsin rivers, which adopted the dam of Reid and Doty, then in process of construction, as part of that system; and that, under that act, a board of public works was established, which made such arrangements with Reid and Doty that they continued and completed the dam; and that, by subsequent legislation, changing the organization under which the work was carried on, the defendants finally became the owners of the dam, with such powers concerning the improvement of the navigation of the river as the legislature could confer in that regard. But it does not appear that any statute made provision for compensation to the plaintiff, or those similarly injured, for damages to their lands. So that the plea, as thus considered, presents substantially the defense that the state of Wisconsin, having, in the progress of its system of improving the navigation of the Fox river, authorized the erection of the dam as it now stands, without any provision for compensating the plaintiff for the injury which it does him, the defendant asserts the right, under legislative authority, to build and continue the dam without legal responsibility for those injuries.

§ 15. *In Wisconsin private property cannot be taken for public uses without compensation. Corresponding provision in federal constitution not applicable to the states.*

And counsel for the defendant, with becoming candor, argue that the damages of which the plaintiff complains are such as the state had a right to inflict in improving the navigation of the Fox river, without making any compensation for them. This requires a construction of the constitution of Wisconsin; for though the constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the federal government, and not on the states. The constitution of Wisconsin, however, has a provision almost identical in language, viz.: That "the property of no person shall be taken for public use without just compensation therefor." Sec. 13, art. 1. Indeed this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no state is now without it, and the only question that we are to consider is whether the injury to plaintiff's property, as set forth in his declaration, is within its protection. The declaration states that, by reason of the dam, the water of the lake was so raised as to cause it to overflow all his land, and that the overflow remained continuously from the completion of the dam, in the year 1861, to the commencement of the suit in the year 1867, and the nature of the injuries set out in the declaration are such as show that it worked an almost complete destruction of the value of the land.

§ 16. *Causing lands to be overflowed is a "taking."*

The argument of the defendant is that there is no *taking* of the land within

the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation. It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

§ 17. — *authorities reviewed.*

In the case of *Sinnickson v. Johnson*, 2 Harr. (N. J.), 129, the defendant had been authorized by an act of the legislature to shorten the navigation of Salem creek by cutting a canal, and by building a dam across the stream. The canal was well built, but the dam caused the water to overflow the plaintiff's land, for which he brought suit. Although the state of New Jersey then had no such provision in her constitution as the one cited from Wisconsin, the supreme court held the statute to be no protection to the action for damages. Dayton, J., said "that this power to take private property reaches back of all constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle." For this proposition he cites numerous authorities, but the case is mainly valuable here as showing that overflowing land by backing the water on it was considered as "taking" it within the meaning of the principle.

In the case of *Gardner v. Newburgh*, 2 Johns. Ch., 162, Chancellor Kent granted an injunction to prevent the trustees of Newburgh from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the legislature which authorized it had made no provision for compensating the plaintiff for the injury thus done to his land. And he did this though there was no provision in the constitution of New York, such as we have mentioned, and though he recognized that the water was taken for a public use. After citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. And he adds that the principles and practice of the English government are equally explicit on this point. It will be seen in this case that it was the diversion of the water from the plaintiff's land, which was considered as taking private property for public use, but which, under the argument of the defendant's counsel, would, like overflowing the land, be called only a consequential injury.

If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the constitution it would become an instrument of oppression rather than protection to individual rights.

But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken. Angell on Water-Courses, § 465*a*; Hooker v. New Haven & Northampton Co., 14 Conn., 146; Rowe v. Granite Bridge Co., 21 Pick., 344; Canal Appraisers v. The People, 17 Wend., 604; Lackland v. North Missouri R. Co., 31 Mo., 180; Stevens v. Proprietors of Middlesex Canal, 12 Mass., 466. And perhaps no state court has given more frequent utterance to the doctrine that overflowing land by backing water on it from dams built below is within the constitutional provision, than that of Wisconsin. In numerous cases of this kind under the mill and mill-dam act of that state this question has arisen, and the right of the mill-owner to flow back the water has been repeatedly placed on the ground that it was a taking of private property for public use. It is true that the court has often expressed its doubt whether the use under that act was a public one, within the meaning of the constitution, but it has never been doubted in any of those cases that it was such a *taking* as required compensation under the constitution. Pratt v. Brown, 3 Wis., 613; Walker v. Shepardson, 4 id., 511; Fisher v. Horicon Iron Co., 10 id., 353; Newell v. Smith, 15 id., 104; Goodall v. City of Milwaukee, 5 id., 39; Weeks v. City of Milwaukee, 10 id., 242. As it is the constitution of that state that we are called on to construe, these decisions of her supreme court, that overflowing land by means of a dam across a stream is taking private property, within the meaning of that instrument, are of special weight if not conclusive on us. And in several of these cases the dams were across navigable streams.

It is difficult to reconcile the case of Alexander v. Milwaukee, 16 Wis., 248, with those just cited, and in its opinion the court seemed to feel the same difficulty. They assert that the weight of authority is in favor of leaving the party injured without remedy when the damage is inflicted for the public good, and is remote and consequential. There are some strong features of analogy between that case and this, but we are not prepared to say, in the face of what the Wisconsin court had previously decided, that it would hold the case before us to come within the principle of that case. At all events, as the court rests its decision upon the general weight of authority and not upon anything special in the language of the Wisconsin bill of rights, we feel at liberty to hold as we do that the case made by the plaintiff's declaration is within the protection of the constitutional principle embodied in that instrument.

We are not unaware of the numerous cases in the state courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other state

constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those states. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further.

We are, therefore, of opinion that the second plea set up no valid defense, and that the demurrer to it should have been sustained.

§ 18. *It requires twenty years to create an easement by prescription.*

The fourth plea recites substantially the same statutes, and acts of the defendants and their predecessors as the second plea, and avers that the dam was completed to its present height in 1852, and that the defendants have ever since had, used and enjoyed the easement of overflowing the plaintiff's lands with his acquiescence, and that they had done this under color of right, and as they lawfully might do. If this is intended as a plea of prescription for an easement the time is not long enough. It requires twenty years. If it is designed as a plea of disseizin it is bad, because it avers that the plaintiff has all the time been seized in fee and in possession of the land in controversy.

But the foundation of the plea seems to be the authority conferred by the various statutes of Wisconsin mentioned in the second plea. We have already held that the defendants were not protected by the act of March 10, 1848, because they exceeded the authority conferred by it, and that, as to the plaintiff's rights, the subsequent statutes were void because they contained no provision for compensation. There is, therefore, no light in which we can view this fourth plea that makes it a good one. The demurrer to it should have been sustained.

§ 19. *Land patented without reservation is not subject to condemnation without compensation.*

The sixth plea, after setting up all the matters alleged in the second, and also that, by the ordinance of 1787 and the subsequent legislation of congress, the navigable streams of that territory were to be forever preserved as free highways, then avers that the land of the plaintiff came to him through a reservation in an Indian treaty in favor of one Therese Paoquett, who received a patent from the United States in 1849. It is alleged that this title came to the plaintiff burdened with an easement in favor of improving the navigation of the Fox river, which authorized the injuries complained of, and of which, therefore, he could not complain.

We do not think it necessary to consume time in proving that when the United States sells land by treaty or otherwise, and parts with the fee by patent without reservations, it retains no right to take that land for public use without just compensation, nor does it confer such a right on the state within which it lies; and that the absolute ownership and right of private property in such land is not varied by the fact that it borders on a navigable stream. The demurrer to this plea should also have been sustained.

Judgment reversed, and the case remanded to the circuit court for further proceedings not inconsistent with this opinion.

KENNEDY v. INDIANAPOLIS.

(18 Otto, 599-606. 1880.)

APPEAL from U. S. Circuit Court, District of Indiana.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.— This is a suit in equity brought by the appellants to quiet title to certain lands in the city of Indianapolis. The facts are as follows: By an act of the general assembly of Indiana, "to provide for a general system of internal improvements," passed January 27, 1836 (R. S. Ind., 1838, p. 337, sec. 4), the board of internal improvements was authorized and directed to construct, among other public works, the Central canal, commencing at the most suitable point on the Wabash & Erie canal between Fort Wayne and Logansport, running thence to Muncietown, thence to Indianapolis, and thence to Evansville on the Ohio river. For this purpose the board was authorized to enter upon, take possession of, and use any lands necessary for the prosecution and completion of the work. Section 16. In all cases where persons felt aggrieved or injured by what was done, a claim could be made for damages, which were to be appraised in a way specially provided for, but in making the appraisal the benefits resulting to the claimant from the construction of the work were to be taken into consideration. Any sum of money thus found to be due was to be paid by the board, but no claim could be recovered or paid unless made within two years after the property was taken possession of. Section 17. The board was also authorized to acquire, by donation or purchase, for the state, the necessary ground for the profitable use of any water-power that might be created by the construction of the canal, and to lease, for hydraulic purposes, any surplus of water there might be over and above what was required for navigation. Sections 22, 23.

The constitution of the state, adopted in 1816, which was in force when this act was passed, and until all the rights of the state under it had been acquired, contains the following as article 1, section 7: "That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor."

The town plat of Indianapolis was laid out on lands granted by congress to Indiana for a seat of government. On this plat, as originally made, Missouri street extended across the town from north to south, a distance of one mile. The board of internal improvements located the Central canal in this street throughout its entire length. From the southerly end of the street the location extended in that direction across what was then known as outlots 121, 125 and 126. These lots were owned, 126 by one Coe, and the other two by Van Blaricum. During the year 1840 or before, the canal was actually built, filled with water, and to some extent navigated from Broad Ripple, a point on the west fork of the White river, about nine miles north of Indianapolis, to a lock in Missouri street, at Market street. From Market street the canal was actually dug, and its banks built to another lock, a distance of a mile or more below; but it was never filled with water for the purposes of navigation, or, in fact, opened for navigation. The lower lock would perhaps hold the water in the level above, but would not pass a boat below.

About the time this part of the work was finished the whole project of completing the canal was abandoned, and has never since been resumed. Consid-

erable work had been done on the line as a whole before the abandonment, but the only part ever opened for navigation to any extent whatever was that between Broad Ripple and the Market street lock. The premises in controversy are between Market street and the next lock below. The state made a lease of water-power to be used at this lower lock, and for many years conducted the water to supply that lease through the canal as constructed below Market street. No other use of the canal was ever made by the state for any purpose, and both the city and the owners of the several outlots have at all times been permitted to fence, bridge and occupy the property as they pleased, provided they did not interrupt the flow of water to supply the power to a mill that had been built below.

Neither the town of Indianapolis nor Coe ever made any claim on the state for compensation on account of the appropriation of their property. Van Blaricum did, however, do so, and he prosecuted his claim until 1848, when it was finally decided against him. It is conceded that no damages were ever awarded him. The defendants, other than the city of Indianapolis and the railroad company, are the owners of all the title to the outlots occupied by the canal which did not pass to the state under the appropriation that was made. In 1850 the general assembly of Indiana passed an act to sell the canal, and under the authority of that act all the part of the canal north of Morgan county, including the premises in controversy, was conveyed to one Francis N. Conwell for the sum of \$2,425. From Conwell the title, such as he got, passed by sundry conveyances to the Water-works Company of Indianapolis. Afterwards that part of the premises south of Market street, not being essential to the business of the Water-works Company, was sold to the Indianapolis, Cincinnati & Lafayette Railroad Company.

Between 1872 and 1874 the city of Indianapolis, the legal successor of the town, took actual possession of Missouri street below the Market street lock, and used it for sewerage purposes, building a sewer therein and filling up the canal. About the same time McKernan, the ancestor of the present appellees of that name, filled up the canal on the outlots in question, and erected one or more houses thereon. This bill was filed by the mortgagees of the railroad company to quiet the title of the company to this property and protect their security. On the hearing the circuit court dismissed the bill for the reason that the appropriation by the state was not sufficient to divest the owners of their title, and consequently the railroad company took nothing by the conveyances under which it claims.

§ 20. *In Indiana the title to land taken for public purposes does not pass until compensation is made.*

According to the later decisions of the supreme court of Indiana, when lands were taken by the state under the internal improvement laws, and just compensation made to the owners, the title in fee was transferred from the owner to the state. *Water-works Company of Indianapolis v. Burkhart*, 41 Ind., 364; *Nelson v. Fleming*, 56 id., 310. The earlier decisions were the other way. *Edgerton and others v. Huff*, 26 id., 35. But, so far as we have been able to discover, it has never yet been held that the title passed out of the owner until "just compensation" had actually been made. In fact the decisions appear to have been uniformly to the effect that it did not. Thus, as early as 1838, in *Rubottom v. McClure*, 4 Blackf., 505, it was said in reference to a statute, of which the one now under consideration is almost a literal copy, that it insured "to any individual whose interest may have been made to yield

to the public good, remuneration for his loss. Actual payment to him is a condition precedent to the investment of the title to the property in the state, but not to the appropriation of it to public use." This was followed in 1846 by *Hankins v. Lawrence*, 8 id., 266. That was a case in which the White Water Valley Canal Company had acquired the title of the state to the White Water canal, one of the works the board of internal improvements was authorized to construct under the act of 1836, and the question was whether it could, under its charter, enter upon lands to complete that canal for the purposes of its incorporation without first having made just compensation to the owner. Upon this the court said: "The question whether payment must be made before the land is taken and used . . . has been already decided by this court. . . . The possession and use of the land in question by the White Water Valley Canal Company are upon the condition subsequent that they will not be in default with respect to the payment for the same as prescribed by the charter, nor with respect to the erecting of the works for which the land is taken. It may be that, should any person claiming under the company remain in possession of the land after a default in such payment, or in erecting the works, he would be considered as a trespasser *ab initio*."

So far as we have been advised, these cases are still the law of Indiana, and they are certainly supported by high authority. Thus, in *Rexford v. Knight*, 11 N. Y., 308, the court of appeals of New York, speaking of statutes similar to that of Indiana, says: "The construction upon those acts has been that the fee did not vest in the state until the payment of the compensation, although the authority to enter upon and appropriate the land was complete prior to the payment." And so, in *Nichols v. Som. & Ken. Railroad Co.*, 43 Me., 359, the supreme court of Maine, in speaking of an article of the constitution of that state which declared that private property should not be taken for public uses without just compensation, uses this language: "While it prevents the acquisition of any title to land or to an easement in it, and does not permit a permanent appropriation of it, as against the owner, without the actual payment or tender of a just compensation, it does not operate to prohibit the legislature from authorizing a temporary exclusive occupation of the land of an individual as an incipient proceeding to the acquisition of title to it, or to an easement in it for a public use, although such occupation may be more or less injurious to the owner. Such temporary occupation, however, will become unlawful unless the party authorized to make it acquire, within a reasonable time from its commencement, a title to the land, or at least an easement in it." And again, in *Cushman v. Smith*, 34 id., 247: "The design seems to have been simply to declare that private property shall not be changed to public property, or transferred from the owner to others for public use, without compensation." Not to multiply cases further, it seems to us that, both on principle and authority, the rule is, under such a constitution as that of Indiana, that the right to enter on and use the property is complete as soon as the property is actually appropriated under the authority of law for a public use, but that the title does not pass from the owner without his consent until just compensation has been made to him.

§ 21. *Compensation by benefits resulting from a work which is discontinued.*

We proceed now to apply this rule to the facts. It is not contended that compensation in money was made for any of the land in dispute. Van Blaricum claimed money, but the tribunal to which, under the statute, his application was referred decided against him. In effect he was told, in answer to his

application, that the benefits he would receive from the construction of the canal would be "just compensation" to him for his property taken. The town and the lot-owners adjoining Missouri street made no claim for compensation. Neither did Coe, the owner of lot 126. In this way these parties signified under the law their willingness to take as their compensation the benefits which would result to them respectively from the construction of the canal. The appropriation was for public use by means of a canal, and the owners were to be paid their compensation for the land taken by the construction of a canal thereon. It would seem to follow that, if the canal was constructed, the compensation which the constitution guaranteed the owner would be made, otherwise not. If the canal was in law built, therefore, the title passed to the state; if not, it remained in the owner. The failure to claim damages within the two years was no more than a waiver of all compensation except such as grew out of the benefits resulting from the construction of the work for which the appropriation was made. To hold that the title passed by mere appropriation, if no claim for damages was made within the two years, would be in effect to decide that, if the state entered on land for a particular use and kept possession as against the owner for two years, it got a title in fee whether the property was actually put to the use or not. Such we cannot believe to be the law.

Was there, then, such a canal constructed over and upon the lands in question as the internal improvement act, under which the appropriation was made, contemplated? A canal, in the sense which that term implies in this connection, means a navigable public highway for the transportation of persons and property. It must not only be in a condition to hold water that can be used for navigation, but it must have in it, as part of the structure itself, the water to be navigated ready for use. Such an instrumentality for "the advancement of the wealth, prosperity and character of the state" (*Rubottom v. McClure, supra*) might confer benefits that would be a just compensation for the private property taken for its use; but until such a structure is actually furnished complete, it can in no proper sense be said that the works have been constructed from which the benefits that are to make the compensation can proceed. A mill-race carrying water for hydraulic purposes is not enough. There must be a canal fitted in all respects for navigation and open to public use, before the benefits can accrue to the owner which are under the law to overcome his claim for damages. No authority was given the board of improvements to appropriate lands for the use of the water-power created by the canal. That could only be acquired by donation or purchase (sec. 16), and no power could be leased until there was a surplus of water. The canal was to be built for navigation. If when built there was found to be more water than was wanted as a means of transportation, it might be leased, but until there was a canal for navigation there was in law none for power. The use of the water for hydraulic purposes was but an incident to the principal object of the work to be done.

There can be no pretense that this canal was ever navigated below Market street, or put in a condition for navigation. It was accepted from the contractor and may have had all its banks and its bed complete; but it is evident from the testimony that it was never finished so that it could be actually used as a navigable canal, and it certainly was never opened by the state to public use in that way. More work had been done on it than on some other parts

of the line, but still it was unfinished when the abandonment of the enterprise took place.

We are aware that in the case of the *Water-works Company v. Burkhart*, *supra*, the supreme court of Indiana decided that the title to the land then in dispute had passed from the owner to the state, but that was on the level above Market street, which had been not only made navigable but had actually been to some extent navigated. The owner, too, had been awarded and paid damages in money. So in *Nelson v. Fleming*, *supra*, the canal was completed and had been in actual use by the public as such for a period of between thirty and forty years before the abandonment occurred. In both these cases, according to the rule that has been stated, the compensation was actually made and the title passed. There the question was one of reversion after title once acquired. Here, as we think, the state never got title, since the requisite compensation was never made. Consequently the state had no title to this property to convey and the railroad company took nothing by its purchase. It follows that the decree below was right, and it is consequently affirmed.

§ 22. In general.—Where private property is required for public exigencies, and the owner refuses voluntarily to accommodate the public, he must be constrained so far as the public necessity requires, justice being done by allowing him an equivalent. Without this power government cannot subsist. *Calder v. Bull*, 3 Dall., 400 (CONSTR., §§ 582-99). See §§ 1, 69, 70.

§ 23. The clause in the constitution against taking private property for public use is a limitation upon the right of eminent domain, and not upon the taxing power. *Gilman v. City of Sheboygan*, 2 Black, 510.

§ 24. *Quere*: Can the legislature make an act divesting one citizen of his freehold and vesting it in another, even with compensation? *Vanhorne v. Dorrance*, 2 Dall., 304, 312.

§ 25. Limitation of federal constitution.—The provision of the federal constitution requiring compensation for private property taken for public uses applies only to the federal government. *Barron v. Mayor, etc., of Baltimore*,* 7 Pet., 243; *Withers v. Buckley*, 20 How., 84 (CONSTR., §§ 207-209); *Charles River Bridge v. Warren Bridge*, 11 Pet., 420 (CONSTR., §§ 2058-62).

§ 26. What is a public use.—A railroad is for public use, and land may be taken therefor upon just compensation being made. *Baltimore, etc., R. Co. v. Van Ness*,* 4 Cr. C. C., 595; *Bonaparte v. Camden, etc., R. Co.*,* 1 Bald., 205; *Secombe v. Railroad Co.*,* 28 Wall., 108.

§ 27. Delegation of power to private companies.—The power under the right of eminent domain of conferring upon private companies the power of appropriation has been so long exercised and acquiesced in, that it is now too late to question it. *United States v. Railroad Bridge Co.*,* 6 McL., 517.

§ 28. A boom company may constitutionally be authorized compulsorily to acquire land on making compensation. *Patterson v. Boom Company*, 3 Dill., 465. Affirmed, 8 Otto, 403 (§§ 76-78).

§ 29. Power of the states.—The states have power, under the right of eminent domain, to appropriate to public uses lands of the United States within their territorial limits, provided, that where such lands are reserved or held for specified national purposes, the appropriation does not injuriously affect such purposes. *United States v. Railroad Bridge Co.*,* 6 McL., 517. See § 7.

§ 30. — to take lands of the United States.—Where land, with the title to which the federal government had never parted after the original cession to it, had been legally appropriated and set apart for its use for military purposes, it was intimated, but not decided, that the same was not appropriable by state authority for a city street, whereby the objects of the reservation would be essentially impaired. *United States v. Chicago*, 7 How., 185.

§ 31. — to take franchise granted by United States.—State legislation may provide for condemning the right of way for a railroad organized under state laws across the right of way and track of another railroad whose franchise is derived from the federal government. *N. P. R'y Co. v. B. & M. R. Co.*,* 1 McC., 452.

§ 32. The charter of the Northern Pacific Railroad Company does not exempt its right of way from the operation of state laws nor preclude another railroad organized under state laws from acquiring the right to cross its track by exercise of the right of eminent domain. *Northern Pac. R. Co. v. St. Paul, etc., R'y Co.*,* 1 McC., 302.

§ 83. What may be taken — Vested rights impairing contracts.— Where “the real estate, easement and exclusive franchise” of erecting and continuing a toll bridge, enjoyed by an incorporated company under a charter forming a contract between it and the state, was appropriated for a highway under a statute of the state, *held*, (1) that the franchise was private property held in subordination to the eminent domain of the state; (2) that neither the adequacy of the compensation allowed, nor the conformity of the proceedings in condemnation with the statute, was examinable by the supreme court upon error to the state court. *West River Bridge Co. v. Dix*, 6 How., 507; approved, *Richmond, etc., Railroad Co. v. Louisa Railroad Co.*, 18 How., 71. See § 64.

§ 84. An exclusive franchise to build bridges and take tolls may be condemned under the right of eminent domain. *Milnor v. Railroad Co.*,* 6 Am. L. Reg., 6.

§ 85. The exercise of the right of eminent domain does not interfere with the inviolability of contracts; a franchise may be taken for public purposes the same as land. *Richmond, etc., R. Co. v. Louisa R. Co.*, 18 How., 71.

§ 86. The property of corporations, even including the franchises, when that is necessary, may be taken for public use under the power of eminent domain, on making due compensation. *Greenwood v. Freight Co.*, 15 Otto, 18 (CORP., §§ 1296-1301).

§ 87. — land dedicated to public use.— Where the owner of property dedicates it to a particular and lawful public use, neither the state nor a municipality can divert it from that purpose except under the power of eminent domain. *United States v. Illinois, etc., R. Co.*, 3 Biss., 174.

§ 88. — land held for like use.— Real estate held by a railway corporation, and necessary for the enjoyment of its essential franchises, cannot be taken from it by another like corporation by the usual method of appropriation. *Lake Shore, etc., R'y Co. v. New York, etc., R'y Co.*, 8 Fed. R., 858.

§ 89. What constitutes a taking.— If a stream is diverted from its natural channel in the prosecution of a public work, and a riparian owner is wholly or injuriously deprived of the use of its waters which he is employing advantageously as an incident to his land, this amounts to taking the property of such owner for public use. *Avery v. Fox*, 1 Abb., 246. See § 8.

§ 90. The act of congress granting telegraph companies power to construct their lines over post roads was not intended to give those companies the right to construct their lines upon the right of way of a railroad company without making compensation; and though such had been the intention, it is beyond the power of congress, because the construction of a telegraph line involves the taking of property. *A. & P. Telegraph Co. v. Chicago, etc., R. Co.*, 6 Biss., 158; 6 Ch. Leg. N., 868.

§ 91. A mere entry on private property for the purpose of making the necessary explorations for location of a public work, as a railroad, is not a taking and need not be preceded by compensation. *Bonaparte v. Camden, etc., R. Co.*,* 1 Bald., 205.

§ 92. A city ordinance which prohibits a railroad company from propelling cars, etc., by steam through a specified street is an appropriate regulation of the use of property and not a taking within the constitutional prohibition. *Railroad Company v. Richmond*, 6 Otto, 531 (COMM., §§ 2158-60).

§ 93. Necessity of appropriation and the interest to be taken.— Where a city appropriated lands for the purpose of an almshouse, by the authority of a statute providing that upon confirmation of the assessment and payment of the sum awarded the “corporation should become and be seized in fee-simple absolute of the lands” taken, and, after twenty-six years’ use of it as contemplated by the appropriation, sold the same, *held*, (1) the statute did not exceed the rightful power of the legislature; (2) the legislature is the exclusive judge of the degree and quality of interest to be appropriated and the necessity of taking it; (3) that it would be deemed to have judged an estate in fee necessary to the use contemplated; (4) that the condemnation vested the fee in the corporation without possibility of reverter on lapse of the particular use; (5) that the remedy of the original owner or successors to his interest, for diversion, if any, was in equity. *De Varaigne v. Fox*,* 2 Blatch., 95. See §§ 5, 6.

§ 94. Compensation must be made.— Private property can be appropriated to public use in the exercise of the right of eminent domain only upon reasonable compensation to the owner. *Charles River Bridge v. Warren Bridge*, 11 Pet., 420 (CONST., §§ 2058-62). See §§ 3, 4, 72, 110.

§ 95. Compensation should be actually made before private property is appropriated. *Avery v. Fox*, 1 Abb., 246.

§ 96. Among the rights of a riparian owner are those of free access to the navigable part of the stream, and the right of making a landing, wharf or pier for his own use or that of the public, and they can be taken from him for the public good only upon due compensation. *Yates v. Milwaukee*, 10 Wall., 497.

§ 97. The federal government cannot appropriate land burdened with the easement of a city street without making compensation to the owner of the fee. *Harris v. Elliot*, 10 Pet., 25.

§ 48. — **benefits.**— Where a statute directed that the actual benefit to accrue to the owner of land taken for public use, from the construction of the work contemplated, should be considered, it was held no objection to its validity that the supposed benefit might equal the value of the property taken. *Chesapeake, etc., Canal Co. v. Key*,* 8 Cr. C. C., 599. See § 4.

§ 49. **Waiver of compensation in advance.**— Under the constitution of Kansas compensation to the owner of land appropriated to public use is a condition precedent to divesting his possession; but where a land-owner, with knowledge that a railroad company had taken possession of her land, made no objection, but permitted the company to build its road and operate its trains over it, and exercise all the rights pertaining to a right of way for ten or twelve years, she was held estopped to eject the company. *Pryzbylowicz v. Missouri River R. Co.*,* 3 McC., 586. See §§ 5, 6.

§ 50. **Acquiescence for the shortest period of time in the occupation by a railroad of the land may amount to a waiver of payment in advance.** *N. P. R. Co. v. B. & M. R. Co.*, 4 Fed. R., 290. See §§ 5, 6.

§ 51. **Instances of exercise of right.**— Where supplies and the building in which they were stored were destroyed by the order of a military officer in command of a part of the public force, to prevent the same falling into the hands of an organized and armed rebel force to whom they would give essential aid and support, of which there was apparent and imminent danger, *held*, that the destruction was rightful, and constituted an exercise of the right of eminent domain entitling the owner to compensation from the government. *Grant v. United States*,* 1 Ct. Cl., 41; 2 Ct. Cl., 551.

§ 52. A military commander may, under circumstances of necessity, which is actual and urgent and immediately pressing, take the private property of the citizen without being personally responsible therefor, in which case the owner must look to government for compensation. *Holmes v. Sheridan*, 1 Dill., 351; *Mitchell v. Harmony*, 18 How., 115.

§ 53. Where property was destroyed by order of a naval officer, whose act was ratified by the government, *held*, that the owner was entitled to compensation upon the ground of the constitutional injunction to make compensation for private property devoted to public use, although the destruction was without precedent authorization. *Wiggins v. United States*,* 1 Ct. Cl., 182; 3 Ct. Cl., 412.

§ 54. Where, in cases of extreme necessity, the government impresses into its service a steamboat, there will arise an implied contract to pay a reasonable amount for the use of it. *United States v. Russell*, 18 Wall., 628.

§ 55. Where the United States released an acknowledged claim of one of her citizens against a foreign power as an inducement for that power to ratify a treaty of cession, it was held that this constituted a taking of private property for public use. *Meade v. United States*,* 1 Ct. Cl., 224.

§ 56. Where articles manufactured in a government prison by the unauthorized use of a patented machine were sold and the proceeds applied to the use of the United States, *held*, that this was not such a taking of private property for public use as is contemplated by the constitution. *Pitcher v. United States*,* 1 Ct. Cl., 7.

§ 57. **Construction of charters, etc.**— In construing a charter authorizing the taking of private property for public purposes, the rule most properly applicable seems to be to give that construction which will best carry into effect the will of the legislature; and accordingly it was held that the words "from" and "at," referring to the terminus of a canal contemplated, did not fix the precise point of the terminus, but left this to be determined by the company within the limits of the charter. *Chesapeake, etc., Co. v. Key*,* 8 Cr. C. C., 599. See § 2.

§ 58. Where the charter of a railroad company designated the route merely by naming the termini, it was held that there must be an apparent deviation from the line intended by the legislature before the courts would arrest the proceedings. *Bonaparte v. The Camden, etc., R. Co.*,* 1 Bald., 205.

§ 59. The terms "every railroad company," in the Nebraska statute, providing for the acquiring by railroads of right of way across other railroads, was held to include a railroad whose charter was derived from congress. *N. P. R'y Co. v. B. & M. R. Co.*,* 1 McC., 452.

§ 60. The statute authorized the secretary of the treasury to purchase land by condemnation, and the district attorney filed a petition in the name of the United States. *Held*, there was no objection to the form of the proceeding. *United States v. Block 131*,* 8 Bias., 208.

§ 61. **Conditions precedent.**— All the conditions on which authority to take property for public use depends are conditions precedent. Hence where the charter of a railroad company provided "that when the location is determined and the survey deposited it shall be lawful to take possession of," etc., "subject to such compensation as is provided," it was held that locating the line, depositing the survey and making the compensation provided were each indispensable to the right of the company to take possession of land without the owner's consent. *Bonaparte v. Camden, etc., R. Co.*,* 1 Bald., 205.

§ 62. **Enjoining illegal appropriation.**—Where the authorities of a city were proceeding to make a high embankment of great width and length to be used as a public roadway upon complainant's land, for the appropriation of which damages had been assessed, but not paid or deposited, and complainant had appealed from the assessment, *held*, that under the constitutional provision that "no right of way should be appropriated until compensation first made," the action of the city was illegal, and that the work being done came within the idea of irreparable injury for which an injunction would be granted. *Eidemiller v. Wyandotte City*, * 2 Dill., 376; 5 Ch. Leg. N., 423.

§ 63. A federal court will not restrain the laying down of a horse railroad track in a city street by provisional injunction at the suit of the owner of the fee, where his right under the decisions of the courts of the state is doubtful, and a stoppage of the work will cause serious injury and inconvenience to the company and the public; but its completion pending the litigation will not prevent perfect relief to complainant in the final decree. *Van Bokelen v. Brooklyn City R. Co.*, * 5 Blatch., 379.

§ 64. **Interference with state appropriations by federal courts.**—When private property, as a ferry franchise, is taken by state authority, not for public use, but to be leased out to private occupants to the end of raising money under pretense of an exercise of the right of eminent domain, this is a wrong redressible by the state legislature and courts, but does not violate the federal constitution. *Mills v. St. Clair County*, 8 How., 569. See §§ 33-38, 69.

§ 65. **Miscellaneous.**—The Maryland act of cession, restraining congress from "affecting the rights of individuals to the soil, except by their consent," does not prevent the exercise by the United States of the power which belongs to every sovereign to appropriate, upon just compensation, private property to public purposes. *Chesapeake, etc., Co. v. Union Bank, etc.*, * 4 Cr. C. C., 75.

§ 66. The act of Maryland of 1785, providing for taking property for private ways, is not unconstitutional. *Barnard et al., Petitioners*, 4 Cr. C. C., 294.

§ 67. Upon the admission of the state of Alabama into the Union, she succeeded to the right of eminent domain theretofore possessed within her boundaries, by the state of Georgia. *Pollard v. Hagan*, 3 How., 212.

§ 68. Where a mortgagee, to whom the claim for the unpaid balance of an award for land condemned for a street had been assigned, sold the land under his mortgage, and bid it in for the amount of the debt, *held*, that his claim against the city was not thereby extinguished. *Chicago v. Tebbetts*, * 14 Otto, 120.

§ 69. With the exercise by a state of its sovereign right of eminent domain, the United States, a separate sovereignty, has no right to interfere by any of its departments, so far as the act of appropriating the property is concerned. *Boom Co. v. Patterson*, 8 Otto, 403 (§§ 76-78). See §§ 1, 22-24, 33, 64.

§ 70. There is no limitation upon the legislative power in the exercise of the right of eminent domain, if the purpose be a public one, and just compensation be made to the owner for the property taken. *Secombe v. Railroad Co.*, * 23 Wall., 106.

II. PROCEEDINGS IN CONDEMNATION.

SUMMARY—When removable to federal courts, § 71.—Compensation, how to be estimated, § 72.—Award may be vacated, § 73; not a contract, § 74.—Nature of proceeding, § 75.

§ 71. When the parties to a proceeding in a state court to assess compensation for property taken for public use are citizens of different states, the cause is removable to the federal courts. *Boom Co. v. Patterson*, §§ 76-78. See §§ 87-90.

§ 72. Compensation is to be estimated by reference to the uses for which the property taken is suitable, having regard to the business or wants of the community existing, or reasonably to be expected in the immediate future. *Ibid.* See §§ 3, 4, 44-48, 110.

§ 73. A provision of statute that the assessment in a proceeding to condemn lands shall, when confirmed by the court, be "final and conclusive," does not preclude the court from vacating the same for mistake, irregularity or fraud. *Garrison v. City of New York*, §§ 79-83. See §§ 95, 96.

§ 74. The judgment in proceedings to condemn land is not a contract within the protection of the federal constitution. *Ibid.*

§ 75. The proceeding to ascertain the benefits or losses which will accrue to the owner of property taken for public use is in the nature of an inquest on the part of the state, and under her control. *Ibid.*

[NOTES.—See §§ 84-111.]

BOOM COMPANY v. PATTERSON.

(8 Otto, 408-410. 1878.)

ERROR to U. S. Circuit Court, District of Minnesota.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—The plaintiff in error is a corporation created under the laws of Minnesota to construct booms between certain designated points on the Mississippi and Rum rivers in that state. It is authorized to enter upon and occupy any land necessary for properly conducting its business; and, where such land is private property, to apply to the district court of the county in which it is situated for the appointment of commissioners to appraise its value and take proceedings for its condemnation. It is unnecessary to state in detail the various steps required to obtain the condemnation. It is sufficient to observe that the law is framed so as to give proper notice to the owners of the land, and secure a fair appraisalment of its value. If the award of the commissioners should not be satisfactory to the company, or to any one claiming an interest in the land, an appeal may be taken to the district court, where it is to be entered by the clerk "as a case upon the docket" of the court, the persons claiming an interest in the land being designated as plaintiffs, and the company seeking its condemnation as defendant. The court is then required to "proceed to hear and determine such case in the same manner that other cases are heard and determined in said court." Issues of fact arising therein are to be tried by a jury, unless a jury be waived. The value of the land being assessed by the jury or the court, as the case may be, the amount of the assessment is to be entered as a judgment against the company, which is subject to review by the supreme court of the state on a writ of error.

The defendant in error, Patterson, was the owner in fee of an entire island and parts of two other islands in the Mississippi river above the Falls of St. Anthony, in the county of Anoka, in Minnesota. These islands formed a line of shore, with occasional breaks, for nearly a mile parallel with the west bank of the river, and distant from it about one-eighth of a mile. The land owned by him amounted to a little over thirty-four acres, and embraced the entire line of shore of the three islands, with the exception of about three rods. The position of the islands specially fitted them, in connection with the west bank of the river, to form a boom of extensive dimensions, capable of holding with safety from twenty to thirty millions of feet of logs. All that was required to form a boom a mile in length and one-eighth of a mile in width was to connect the islands with each other, and the lower end of the island farthest down the river with the west bank; and this connection could be readily made by boom sticks and piers.

The land on these islands owned by the defendant in error the company sought to condemn for its uses; and upon its application commissioners were appointed by the district court to appraise its value. They awarded to the owner the sum of \$3,000. The company and the owner both appealed from this award. When the case was brought before the district court, the owner, Patterson, who was a citizen of the state of Illinois, applied for and obtained its removal to the circuit court of the United States, where it was tried. The jury found a general verdict assessing the value of the land at \$9,358.33, but accompanied it with a special verdict assessing its value aside from any consideration of its value for boom purposes at \$300, and, in view of its adaptability for those purposes, a further and additional value of \$9,058.33. The

company moved for a new trial, and the court granted the motion, unless the owner would elect to reduce the verdict to \$5,500. The owner made this election, and judgment was thereupon entered in his favor for the reduced amount. To review this judgment the company has brought the case here on a writ of error.

The only question on which there was any contention in the circuit court was as to the amount of compensation the owner of the land was entitled to receive, and the principle upon which the compensation was to be estimated. But the company now raise a further question as to the jurisdiction of the circuit court. Objections to the jurisdiction of the court below, when they go to the subject-matter of the controversy and not to the form merely of its presentation or to the character of the relief prayed, may be taken at any time. They are not waived because they were not made in the lower court.

§ 76. *Right of eminent domain generally.*

The position of the company on this head of jurisdiction is this: that the proceeding to take private property for public use is an exercise by the state of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned. The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the constitutions of the several states providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry takes the form of a proceeding before the courts between parties,—the owners of the land on the one side, and the company seeking the appropriation on the other,—there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the state.

§ 77. *Proceedings to condemn are removable to the federal courts.*

The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the district court by appeal from the award of the commissioners, it took, under the statute of the state, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the district court. *Turner v. Halloran*, 11 Minn., 253. The case would have been in no essential particular different had the state authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value. That a suit of that kind could be transferred from the state to the federal court, if the

controversy were between the company and a citizen of another state, cannot be doubted. And we perceive no reason against the transfer of the pending case that might not be offered against the transfer of the case supposed.

The act of March 3, 1875, provides that any suit of a civil nature, at law or in equity, pending or brought in a state court, in which there is a controversy between citizens of different states, may be removed by either party into the circuit court of the United States for the proper district; and it has long been settled that a corporation will be treated, where contracts or rights of property are to be enforced by or against it, as a citizen of the state under the laws of which it is created, within the clause of the constitution extending the judicial power of the United States to controversies between citizens of different states. *Paul v. Virginia*, 8 Wall., 177 (Constr., §§ 1052-59). And in *Gaines v. Fuentes*, 92 U. S., 20 (Cours., §§ 916-21), it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation and is presented by the pleadings for judicial determination. Within the meaning of these decisions we think the case at bar was properly transferred to the circuit court and that it had jurisdiction to determine the controversy.

§ 78. *The rule by which land should be valued in cases of condemnation for public uses.*

Upon the question litigated in the court below, the compensation which the owner of the land condemned was entitled to receive, and the principle upon which the compensation should be estimated, there is less difficulty. In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted? that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands or to lands situated elsewhere on the river; as by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands.

We do not understand that all persons, except the plaintiff in error, were precluded from availing themselves of these lands for the construction of a boom, either on their own account or for general use. The clause in its charter authorizing and requiring it to receive and take the entire control and management of all logs and timber to be conveyed to any point on the Mississippi river must be held to apply to the logs and timber of parties consenting to such control and management, not to logs and timber of parties choosing to keep the control and management of them in their own hands. The Mississippi is a navigable river above the Falls of St. Anthony, and the state could not confer an exclusive use of its waters, or exclusive control and management of logs floating on it, against the consent of their owners. Whilst in *Atlee v. Packet Company*, 21 Wall., 389, we held that a pier obstructing navigation, erected in the river as part of a boom, without license or authority of any kind except such as arises from the ownership of the adjacent shore, was an unlawful structure, we did not mean to intimate that the owner of land on the Mississippi could not have a boom adjoining it for the reception of logs of his own or of others, if he did not thereby impede the free navigation of the stream. Aside from this, we do not think that the state is precluded by anything in the charter of the company from giving a license to the defendant in error to construct a boom near his lands. Moreover, the United States, having paramount control over the river, may grant such license if the state should refuse one. The adaptability of the lands for the purpose of a boom was, therefore, a proper element for consideration in estimating the value of the lands condemned. The contention on the part of the plaintiff in error is, that such adaptability should not be considered, assuming that this adaptability could never be made available by other persons, by reason of its supposed exclusive privileges; in other words, that by the grant of exclusive privileges to the company the owner is deprived of the value which the lands, by their adaptability for boom purposes, previously possessed, and therefore should not now receive anything from the company on account of such adaptability upon a condemnation of the lands. We do not think that the owner, by the charter of the company, lost this element of value in his property.

The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value find support in the several cases cited by counsel. Thus, In the *Matter of Furman Street*, 17 Wend., 669, where a lot upon which the owner had his residence was injured by cutting down an embankment in opening a street in the city of Brooklyn, the supreme court of New York said that neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him; but that the proper inquiry was, "What is the value of the property for the most advantageous uses to which it may be applied?" In *Goodwin v. Cincinnati & Whitewater Canal Co.*, 18 Ohio St., 169, where a railroad company sought to appropriate the bed of a canal for its track, the supreme court of Ohio held that the rule of valuation was what the interest of the canal company was worth, not for canal purposes or for any other particular use, but generally for any and all uses for which it might be suitable. And in *Young v. Harrison*, 17 Ga., 30, where land necessary for an abutment of a bridge was appropriated, the supreme court of Georgia held that its value was not to be restricted to its agricultural or productive capacities, but that inquiry might be made as to all purposes to which it could

be applied, having reference to existing and prospective wants of the community. Its value as a bridge site was, therefore, allowed in the estimate of compensation to be awarded to the owner.

These views dispose of the principle upon which the several exceptions by the plaintiff in error to the rulings of the court below in giving and in refusing instructions to the jury were taken, and we do not deem it important, therefore, to comment upon them.

Judgment affirmed.

GARRISON v. CITY OF NEW YORK.

(21 Wallace, 196-205. 1874.)

ERROR to U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—Garrison sued the city of New York to recover the amount of an award in his favor made in proceedings to widen and straighten Broadway. The act under which the proceedings were had was passed May 17, 1869, and among other things authorized the appointment of commissioners, etc., and provided that all acts then in force relating to the opening and widening of streets should apply, etc. An award was made by the commissioners in Garrison's favor, and after the confirmation of the report, on February 27, 1871, an act was passed authorizing an appeal on behalf of the city within a limited time, and providing further that, notwithstanding the pendency of an appeal, the order of confirmation might be vacated for certain causes. Under this act the order of confirmation in Garrison's case was vacated, and he sued the city to recover the amount of the award. The city set up the vacation of the order, and Garrison demurred.

§ 79. *The court may vacate a final judgment, in proceedings to condemn, for irregularity, mistake or fraud.*

Opinion by MR. JUSTICE FIELD.

To reverse the judgment of the circuit court, the plaintiff contends that the act of the legislature of New York of February 27, 1871, was repugnant to the constitution of the United States in that it impaired the obligation of a contract, and to the constitution of the state in that it undertook to divest a vested right contrary to the law of the land and without due process of law. As a basis for his argument he assumes that under the statute of the state relating to the opening and improvement of streets in the city of New York, passed in 1813, and which is one of the laws referred to in the act of 1869, and made applicable to the improvement authorized, the proceedings of the commissioners, when their report was confirmed by the supreme court, were so far final and conclusive of the right of the city to the property and of the plaintiff to the award, that neither were subject to any legislative or judicial interference.

The same position here urged was relied upon in the supreme court and the court of appeals of the state on the appeal from the order vacating the confirmation taken by one of the parties to whom an award had been rendered. In the Matter of Widening Broadway, 61 Barb., 483, and 49 N. Y., 150. And in both courts it was held that the provision in the statute of 1813, which declares that the report of the commissioners of estimate and assessment, when confirmed by the court, shall be "final and conclusive," only meant that no appeal should lie from the order of confirmation to a higher court, and that it did not preclude an application to the court to vacate the order for mistake,

irregularity or fraud in the proceedings; that the supreme court had power to hear such motions in ordinary cases of judgments and orders in suits there pending, and that no reason existed against the possession or exercise of the power in cases of this character. The provision in question, said the court of appeals, "plainly never intended to give a vested interest in a mistake and irregularity or fraud, whereby important rights of property were acquired or lost. It had reference simply to an appeal upon the merits, and is satisfied with that. All judgments are liable to be set aside for fraud, mistake or irregularity, and a vested interest therein is subject to that liability." The supreme court held that the act of 1871 was constitutional. The court of appeals held that, independent of the act, and without passing upon its validity, the supreme court had authority to set aside the order upon the grounds stated. If the views of either of these courts be correct, they dispose of the questions in this case. And the construction of the statute of the state by the court of appeals, and its decision as to the powers of the supreme court of the state to correct or set aside its own judgments, upon application within reasonable time, for mistake, irregularity or fraud, are conclusive upon us.

§ 80. *A judgment is not a contract.*

There is, therefore, no case presented in which it can be justly contended that a contract has been impaired. It may be doubted whether a judgment not founded upon an agreement, express or implied, is a contract within the meaning of the constitutional prohibition. It is sometimes called by text-writers a contract of record, because it establishes a legal obligation to pay the amount recovered, and, by fiction of law, where there is a legal obligation to pay a promise to pay is implied. It is upon this principle, says Chitty, that an action in form *ex contractu* will lie on a judgment of a court of record. Chitty on Contracts, Perkins' edition, 87. But it is not perceived how this fiction can convert the result of a proceeding, not founded upon an agreement express or implied, but upon a transaction wanting the assent of the parties, into a contract within the meaning of the clause of the federal constitution which forbids any legislation impairing its obligation. The purpose of the constitutional prohibition was the maintenance of good faith in the stipulations of parties against any state interference. If no assent be given to a transaction no faith is pledged in respect to it, and there would seem in such case to be no room for the operation of the prohibition.

In the proceeding to condemn the property of the plaintiff for a public street, there was nothing in the nature of a contract between him and the city. The state, in virtue of her right of eminent domain, had authorized the city to take his property for a public purpose upon making to him just compensation. All that the constitution or justice required was that a just compensation should be made to him, and his property would then be taken whether or not he assented to the measure.

§ 81. *The proceeding to assess compensation is in the nature of an inquest by the state.*

The proceeding to ascertain the benefits or losses which will accrue to the owner of property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the state, and is necessarily under her control. It is her duty to see that the estimates made are just, not merely to the individual whose property is taken, but to the public which is to pay for it. And she can to that end vacate or authorize the vacation of any inquest taken by her direction, to ascertain particular facts for her

guidance, where the proceeding has been irregularly or fraudulently conducted, or in which error has intervened, and order a new inquest, provided such methods of procedure be observed as will secure a fair hearing from the parties interested in the property. Nor do we perceive how this power of the state can be affected by the fact that she makes the finding of the commissioners upon the inquest subject to the approval of one of her courts. That is but one of the modes which she may adopt to prevent error and imposition in the proceedings. There is certainly nothing in the fact that an appeal is not allowed from the action of the court in such cases, which precludes a resort to other methods for the correction of the finding where irregularity, mistake or fraud has intervened.

§ 82. *Title does not vest till compensation paid.*

Until the property is actually taken, and the compensation is made or provided, the power of the state over the matter is not ended. Any declaration in the statute that the title will vest at a particular time must be construed in subordination to the constitution, which requires, except in cases of emergency admitting of no delay, the payment of the compensation, or provision for its payment, to precede the taking, or, at least, to be concurrent with it. The statute of 1818 would also seem so far to modify the act of 1813 as to require a formal acceptance of the land on the part of the corporation before the title can vest.

§ 83. *No such vested right in a judgment as to preclude its re-examination and vacation.*

The objection to the act of 1871, that it impairs the vested rights of the plaintiff, and is, therefore, repugnant to the constitution of the state, is already disposed of by what we have said upon the first objection. There is no such vested right in a judgment, in the party in whose favor it is rendered, as to preclude its re-examination and vacation in the ordinary modes provided by law, even though an appeal from it may not be allowed; and the award of the commissioners, even when approved by the court, possesses no greater sanctity.

Judgment affirmed.

§ 84. *The mode of exercising the right of eminent domain, in the absence of any provision in the organic law prescribing a contrary course, is within the discretion of the legislature.* *Secombe v. Railroad Co.*, * 28 Wall., 108.

§ 85. *State decisions.*—When the state courts have passed upon the validity and regularity of condemnation proceedings as determined by a construction of state statutes, the federal courts will follow the state decisions. *Ibid.*

§ 86. *When necessary.*—Proceedings for condemnation are necessary when a perfect title cannot be obtained by purchase. *United States v. Block* 121, * 8 Biss., 208.

§ 87. *Jurisdiction of federal courts.*—A proceeding by the United States to condemn land required for government buildings is a suit of a civil nature within the sense of the judiciary act of 1789, of which the circuit court has jurisdiction. *Ibid.* See §§ 71, 75, 93.

§ 88. A proceeding to condemn lands partakes so much of the nature of a suit as to be within the jurisdiction of the circuit courts as defined in the judiciary act of 1789. *Kohl v. United States*, 1 Otto, 367 (§§ 7-13). See § 71.

§ 89. A proceeding in a state court between a land-owner who is a citizen of another state and a corporation seeking to condemn his property is removable to the federal courts. *Patterson v. Boom Co.*, 8 Dill., 465. Affirmed, 8 Otto, 403 (§§ 76-78). See §§ 71, 75.

§ 90. The state is not a party to condemnation proceedings instituted by a railroad against land-owners. *Warren v. Wisconsin Valley R. Co.*, 6 Biss., 427.

§ 91. *In federal courts under state laws.*—Congress has power to clothe the courts of the United States with authority to proceed in conformity with a state statute for the condemnation of property. *United States v. Block* 121, * 8 Biss., 208.

§ 92. In the territories.—The United States cannot take private property in one of the territories for public use without some provision by act of congress or by the territory. *Territorial Roads*, *7 Op. Att'y Gen., 320.

§ 93. Right of trial by jury.—A statute which provides that compensation for lands taken by the right of eminent domain be assessed by commissioners does not infringe the constitutional right of trial by jury. *Bonaparte v. The Camden, etc., R. Co.*, *1 Bald., 205. See §§ 5, 13, 71, 75, 87.

§ 94. Award is not impeachable collaterally.—Proceedings to condemn cannot be questioned collaterally where there was jurisdiction of the parties and subject-matter. *Secombe v. Milwaukee, etc., R. Co.*, *2 Dill., 469; *Secombe v. Railroad Co.*, *23 Wall., 108.

§ 95. Order vacating inquisition — Appeal.—An order quashing an inquisition in proceedings to condemn land is not a final order from which error will lie to the supreme court. *Chesapeake, etc., Co. v. Union Bank*, 8 Pet., 259 (APPEALS, § 290). See §§ 73, 74.

§ 96. Statute vacating inquisition, when valid.—Where an inquisition condemning land for a railroad, under a statute investing the company with title upon payment or tender of the amount of the award, had been confirmed by the court, *held*, that a statute of the state passed before payment or tender, directing the inquisition to be set aside, did not infringe the federal constitution. *The Baltimore & Susquehanna R. Co. v. Nesbit*, 10 How., 395 (CONSTR., §§ 603-607).

§ 97. Appraisers, disqualification by interest.—A subscriber for stock in a canal company, who has not paid and is not liable to the company for assessments, is not disqualified by interest to serve upon an inquisition to condemn land for the work. *Chesapeake, etc., Co. v. Binney*, 4 Cr. C. C., 68.

§ 98. Award by majority.—Where all the commissioners in condemnation proceedings acted, an award, concurred in and signed by a majority, is valid. *N. P. Ry Co. v. B. & M. R. Co.*, *1 McC., 452.

§ 99. Notice of meeting.—Although the charter does not expressly require notice to the parties interested, it may perhaps be good cause to set aside an inquisition that an owner of land to be appropriated had no knowledge of the proceeding, if he was at the time in the county. *Chesapeake, etc., Co. v. Union Bank, etc.*, *4 Cr. C. C., 75.

§ 100. *Quære*: Will an inquisition be set aside merely because it contains no evidence of notice, where the land-owner in fact was notified and attended? *Ibid*.

§ 101. Warrant for jury.—Under a statute requiring the warrant to express a day for the meeting of the jury to assess damages for the property appropriated, a warrant which named several days, or "so many of them as might be necessary," was fatal to the inquisition. *Chesapeake, etc., Co. v. Key*, *8 Cr. C. C., 599.

§ 102. As the marshal is to summon jurors not related to the parties, it seems to be necessary that the parties should be named in the warrant. *Chesapeake, etc., Co. v. Union Bank*, *4 Cr. C. C., 75.

§ 103. Award, description of land.—The inquisition may describe the land taken by reference to the description of it in the warrant. *Chesapeake, etc., Co. v. Binney*, 4 Cr. C. C., 68.

§ 104. Where several warrants have been issued and returned with inquisitions for condemning land, and each inquisition refers to a warrant returned therewith, it is competent to identify by parol the warrant applicable to each inquisition. *Chesapeake & Ohio Canal Co. v. Union Bank*, *4 Cr. C. C., 75.

§ 105. The direction in the charter that the jury "describe and ascertain the bounds of the land valued" requires them to state the bounds with certainty, but *quære* whether they must themselves run and measure the lines or see it done by a surveyor. *Ibid*.

§ 106. Where the statute required the jury to ascertain and describe the bounds of the land valued by them, this description in the inquisition and warrant returned was held fatally defective: "Lots 8, 9 and 10 in square 1," and "all those other pieces of land belonging to said lots or any of them and being due west of said lots or any of them, and extending thence to and binding with the channel of Rock creek." *Ibid*.

§ 107. Where the jury in the inquisition say, "all the said land . . . as of an absolute estate in perpetuity and all damages are of the value," etc., they clearly express "the quality and duration of the interest and estate" in the land valued. *Ibid*.

§ 108. — naming jurors not sworn.—The inquisition need not contain the names of jurors summoned but not sworn. *Chesapeake, etc., Co. v. Binney*, 4 Cr. C. C., 68.

§ 109. — stating value and damage in gross sum.—Where benefits may be set-off as well against the value of the land taken as against damages, it is not an objection to an inquisition that it finds the value and damages in a gross sum. *Chesapeake, etc., Co. v. Union Bank*, *4 Cr. C. C., 75.

§ 110. What considered in estimating compensation.—In estimating compensation for right of way for a canal over land in which pipes had been laid connected with a brewery, the

direct and probable loss or injury which will necessarily be sustained by the construction of the work, in being compelled to remove and relocate the pipes, is a proper item of charge. *Claim of Anschutz*, *14 Op. Att'y Gen., 214. See §§ 3, 4, 44-48, 72.

§ 111. Separate trials between several owners.—The statute of Ohio gives the right to a separate trial to the owners of each parcel appropriated collectively, but not to each owner of an estate or interest in each parcel. *Kohl v. United States*, 1 Otto, 367 (§§ 7-13).

ENACTMENT OF LAWS.

See CONSTITUTION AND LAWS, XIII, 2.

ENEMY.

See WAR.

ENGLAND.

See FOREIGN GOVERNMENTS.

ENGLISH STATUTES.

See CONSTITUTION AND LAWS.

ENLISTMENT.

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ENROLLMENT OF VESSELS.

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ENTIRE AND DIVISIBLE CONTRACTS.

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EPISCOPAL CHURCH—EQUITABLE SUITS FOR FORECLOSURE.

EPISCOPAL CHURCH.

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EQUAL PROTECTION OF THE LAWS.

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EQUITABLE ESTATES AND INTERESTS.

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TABLE OF CASES.

A star (*) following the name of a case indicates that the case will not be published in full.

The full-face figures refer to cases in full, the others to digest matter.

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Abbreviations: Ded., Dedication. Dom. Rel., Domestic Relations. Eas., Easements. Elect., Elections. Em. Dom., Eminent Domain.

Adams v. Adams, 21 Wall., 185-196. Dom. Rel., §§ 252, 253.
 Adams v. Law,* 17 How., 417. Dom. Rel., §§ 397, 400.
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 Alexander v. Selden, 4 Cr. C. C., 96. Dom. Rel., § 532.
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 Angier, In re,* 10 Am. L. Reg. (N. S.), 190. Dom. Rel., § 536.
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 Armstrong v. Wyandotte Bridge Co., McCahon, 170. Dom. Rel., § 925.
 A. & P. Tel. Co. v. Chicago, etc., R. Co., 6 Biss., 158. Em. Dom., § 40.
 Atwood v. Kittell,* 17 N. B. R., 406. Dom. Rel., § 403.
 Avery v. Doane, 1 Biss., 64-69. Dom. Rel., §§ 72-76.
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Baldwin v. Rosier, 1 McC., 384, 385. Dom. Rel., § 898.
 Banks v. Ogden, 2 Wall., 57. Ded., § 108.

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Agricultural Bank of Mississippi v. Rice, 4 How., 225. Dom. Rel., § 127.
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 Citizens' Bank v. Nantucket Steamboat Co., 2 Story, 48. Dom. Rel., § 944.
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 Barnes v. De France,* 2 Colo. T'y, 294. Dom. Rel., § 277.
 Barney v. Keokuk,* 4 Dill., 593. Ded., §§ 9, 84, 108, 112.
 Barney v. Mayor, etc., of Baltimore, 1 Hughes, 118. Ded., §§ 99, 112.
 Barr v. Galloway, 1 McL., 476-483. Dom. Rel., §§ 471-476.
 Barrett v. Failing,* 6 Saw., 473. Dom. Rel., § 597.
 Barron v. Mayor, etc., of Baltimore,* 7 Pet., 243. Em. Dom., § 25.
 Barry, In re,* 5 Law Rep., 374. Dom. Rel., § 661.
 Bartenbach, In re,* 11 N. B. R., 61. Dom. Rel., § 537.
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Y.

TABLE OF CASES CITED.

The names of Banks and Boats and Vessels will be found under the sub-titles BANKS and BOATS AND VESSELS in alphabetical order under B. The names of Insurance Companies are under the sub-title INSURANCE COMPANIES under I.

Abbreviations: Ded., Dedication. Dom. Rel., Domestic Relations. Eas., Easements. Elect., Elections. Em. Dom., Eminent Domain.

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